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No.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1982

MORRIS I. KURTZ,

Petitioner

v.

UNITED STATES OF AMERICA
on behalf of its agency
THE SMALL BUSINESS ADMINISTRATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the decisions of the Courts below which permitted the SBA, an assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment, effect a result which violated rulings of this Honorable Court?

2. Did the decision of the Courts below which ruled that Kurtz, a guarantor, was a "debtor" for certain purposes under the California Uniform Commercial Code and not for others create a conflict among the circuits on this question of law?

3. Did the Courts below err in making factual findings without the benefit of having any evidence concerning said disputed crucial issues of fact?

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TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Morris I Kurtz, respectfully prays that a Writ of Certiorari be issued to review a Judgment Order of the United States Court of Appeals for the Third Circuit entered in this matter on July 7, 1982.

OPINION BELOW

The Judgment Order of the Court of Appeals for the Third Circuit and the Opinion and Order of the United States District Court for the Eastern District of Pennsyl-

vania appear in the Appendix hereto. The Opinion and Order of the District Court is reported at 525 F.Supp 734 (E.D. Pa., 1981).

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the decisions of the Courts below which permitted the SBA, an assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment, effect a result which violated rulings of this Honorable Court?

2. Did the decision of the Courts below which ruled that Kurtz, a guarantor, was a "debtor" for certain purposes under the California Uniform Commercial Code and not for others create a conflict among the circuits on this question of law?

3. Did the Courts below err in making factual findings without the benefit of having any evidence concerning said disputed crucial issues of fact?

STATUTORY PROVISIONS INVOLVED

Time for Commencing Actions Brought by the United States 28 U.S.C. §2415

California Code of Civil Procedure §337

California Uniform Commercial Code

§9-105

§9-501

§9-504

Full texts of the provisions cited above are set forth in the appendix hereto.

STATEMENT OF THE CASE

Procedural Background

This action was commenced by the United States on behalf of its agency, the Small Business Administration, to recover a deficiency judgment against Morris I. Kurtz, a guarantor of a loan made to Arnold's Cleaners, Inc. in April of 1969.

The government filed a Motion for Summary Judgment which was denied by Order of the District Court entered on May 17, 1979. Subsequently, on April 23, 1980 Defendant filed a Motion for Summary Judgment and, at the same time, the government re-filed its Motion for Summary Judgment. In its Opinion and Order entered October 30, 1981, the District Court granted the government's Motion for Summary Judgment and denied Defendant's Motion. Judgment was entered in favor of the government on November 3, 1981.

The Order of the District Court and the Judgment entered thereon were appealed by Kurtz to the United States Court of Appeals for the Third Circuit on November 13, 1981. By Judgment Order entered on July 7, 1982, the Judgment of the District Court was affirmed without an opinion but "essentially for the reasons set forth in the Opinion of the District Court which is reported at 525 F.Supp 734 (E.D. Pa., 1981)."

For the benefit of this Honorable Court, since the Court of Appeals adopted the Opinion of the District Court, references herein when made to the District Court's Opinion are to be considered as being references to the decision of the Court of Appeals decision as well.

Factual Background

On April 11, 1969, Arnold's Cleaners, Inc. (hereinafter refered to as "ARNOLD'S") , entered into a Loan Agreement with Guardian Mutual Life Insurance Company of America (hereinafter referred to as "GUARD-

IAN") secured by a promissory note in the amount of Four Hundred Thousand ($400,000.00) Dollars with interest at 8% per annum (known hereinafter sometimes as "ORIGINAL LOAN"). At all times material hereto, Arnold's was a California Corporation engaged in the dry cleaning business in Los Angeles. Morris I. Kurtz, the sole shareholder of Arnold's, guaranteed the original loan. As part of the loan package, the Small Business Administration (hereinafter referred to as "SBA" or "GOVERNMENT") guaranteed, in addition, 90% of the loan.

By reason of its anticipated position as guarantor of 90% of the amount of the loan to Arnold's, the SBA, through the actions of its local counsel, had become closely involved in every aspect of the transaction. SBA employees and attorneys participated in all negotiations, reviewed every document and approved every aspect of the transaction. A cursory review of the loan documents (which are included in the Appendix) reveals that although some of the documents were standard SBA forms, most were drafted and tailored specifically to meet the needs of the situation and the demands of the SBA, acting through its local counsel.

Arnold's was unable to make all required payments to Guardian between September, 1969 and January 1970. On December 14, 1970, due to Arnold's failure to meet its obligations as they became due, Guardian made demand on SBA for payment of the guaranteed portion of the loan. SBA honored the demand, paid the *total* amount due to Guardian on December 17, 1970, and Guardian assigned its rights to SBA.

Shortly thereafter, Arnold's filed a Petition For An Arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§702-799 (repealed October 1, 1979) in the United States District Court for the Central District of California. The SBA, Arnold's only major secured creditor, filed a proof of claim in the Bankruptcy proceedings on May 7, 1971. On June 11, 1971, a plan of Arrangement was submitted to the Court and to Arnolds' credi-

tors. The plan proposed that, 1) Arnold's be divided into two separate business operations, one for dry cleaning and one for Uniform Rentals;* 2) that the SBA release its security interest in the assets of the Uniform Rental business and in any after-acquired property; 3) that the reorganized debtor (a new legal entity) pay off a portion of the debt owed to SBA pursuant to a specified schedule; and, 4) that Kurtz surrender his shares in Arnold's and thereby terminate his interest in and control of the business.

The proposed plan was adopted by all of Arnolds' creditors, despite the written objections of Kurtz. The plan fixed the sum payable to SBA by the reorganized debtor at $379,126.32 with interest at 6% per annum. It was agreed further by and between SBA and the reorganized debtor that the sum due the SBA would be paid in monthly installments equal to one-half (½) the net profits earned by Arnold's; or according to a schedule, whichever amount was greater. Kurtz was compelled also to surrender his stock in Arnold's and to terminate any interest which the shares may have given him in the reorganized debtor.

The reorganized debtor thereafter commenced operations and made several payments (between December, 1971 and April, 1972) totalling $1,750.00. At that time, the reorganized debtor ceased operations and made no further payments to SBA. Arnold's remained closed and subject to the sole and exclusive control of the SBA for nearly seven months, after which the assets of the reorganized debtor were ultimately and formally liquidated in November, 1972 by the SBA at Public Auction; without notice to Kurtz. From the liquidation, the sum of $7,867.88 was realized and credited to Arnold's

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*The primary reason for Arnold's having entered into the loan transaction was to permit it to engage in the uniform rental business. Arnold's required the money to purchase the necessary inventory and equipment.

account with the SBA. Thereafter, nothing happened until May 8, 1975 when SBA requested payment from Kurtz pursuant to his guarantee of April, 1969. Subsequently, on February 3, 1976, the government filed the instant action to enforce the guaranty.

REASONS FOR GRANTING THE WRIT

I. The decisions of the Courts below which permitted the SBA, as assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment were in direct violation of the rulings of this Honorable Court

This case arose out of the default of Arnold's to honor its obligation on a simple loan agreement between two private entities. The obligations of Arnold's were secured by an SBA guaranty and the personal guaranty of Kurtz. Every aspect of the transaction; including all negotiations, the preparation and execution of documents took place within the legal boundaries of the State of California. All parties to the transaction, including the SBA, were represented in all phases of the transaction by local counsel, familiar with the laws of the State of California. The documents ultimately executed were the result of careful and detailed negotiation and examination by these local counsel. The terms of the agreements which resulted from this process provided that they would be governed by the laws of the State of California.

One of the specially drafted documents involved in this transaction was entitled "Supplement to Loan Agreement and Note." (A.66). This document contained a careful and detailed recitation of the specific conditions, covenants and considerations upon which the transaction was based. One specific clause of that agreement, contained in Par. 8.4 thereof, contained the following language:

> "This Agreement is being delivered and is intended to be performed in the State of California and shall be construed and enforced in accordance with the laws threreof."

The language of the agreement established clearly and beyond dispute that the law governing all aspects of

the transaction was the law of California. The SBA, which was the essential party to the transaction, did not object to the terms, and, in fact, approved the language of the agreement. Obviously, the SBA was aware during the negotiations of the possibility that at some time in the future, in the event of default, it would step into the shoes of the guaranteed party and thus be bound by the very same terms of the agreement.

Subsequent to Arnold's default, the SBA, on December 17, 1971, honored its guaranty to Guardian and obtained from Guardian an assignment of Guardian's rights against Kurtz. But, the government did not proceed against Kurtz. Rather, the government chose alternative means of recovery of its claim in the reorganization of Arnold's. From December 17, 1971 until February 3, 1976, when this suit was filed, the government took no legal action against Kurtz. Thus, by the time the government sought to enforce the Kurtz obligation by lawful means, the four year California Statute of Limitations had run and the claim had become time-barred.* Nevertheless, the government was not deterred. It discovered that a more suitable federal statute of limitations existed which, if applied, would save the government's action from dismissal.

Unfortunately, the District Court and the Court of Appeals applied the federal limitations provision to the case at bar. The effect of the decisions below was to permit the government unilaterally to change terms which were material to the agreement simply by an assignment of that agreement to the government, with complete disregard for the rights of the other parties involved in the transaction. The federal statute of limitations gave the government six years, rather than four, within which to commence its action.

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* Cal. Civ. Proc. Code §337(1) provides for commencement "within four (4) years:

1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . (A-94).

The approach taken by the government in this case is not an unusual one. This Honorable Court has dealt with similar cases on at least two occasions; in *United States v. Yazell*, 382 U.S. 341, 15 L.Ed. 2d 404 (1966) and in *United States v. Kimbell Foods, Inc.* 440 U.S. 715, 59 L.Ed 2d 711 (1979). In each case, although the government has sought the application of more favorable federal law in disregard of the contents of its agreement, this Court has ruled that the law of the state upon which the parties had agreed originally shall apply. Yet, the government persists in treating contracts as if they were chamelions which change to suit its needs in any situation.

In *United States v. Yazell, supra,* the government attempted to enforce a deficiency judgment against the separate property of a spouse which was protected from lien by the coverture law of Texas. The SBA had acted in much the same manner, in the *Yazell* case as it did in the instant case; i.e., through local counsel, which designated that the laws of Texas should goven the construction and enforcement of the agreement.

This Honorable court, in an opinion by Justice Fortas, noted four specific factors which mandated the application of Texas law to the case before it. The court noted:

> 1) The loan was custom tailored to the situation with specific reference to Texas law;
> 2) The SBA was aware of and chargeable with knowledge that the transaction would be governed by local (Texas) law;
> 3) The parties entered into the agreement without any thought that the defenses available under Texas law would not be available to them; and
> 4) Under the circumstances, the Government attempted to obtain an unfair advantage for which it had not bargained.
> id. 382 U.S. 345-346; 15 L.Ed. 2d 407.

The factors upon which this court relied in *Yazell*, supra, apply with equal force in this case, and dictate the application of California law. Nevertheless, the District Court and the Court of Appeals completely disregarded these factors and sought to find support for the government's position in a so-called "umbrella" clause contained in Par. 7 of the Supplement to the Loan Agreement and Note which stated:

> "[i]t is not intended that any of the terms or conditions recited herein be inconsistent with the provisions of the Small Business Act or any rules or regulations promulgated thereunder or inconsistent with any other law applicable to this transaction."

Under the district court's interpretation of the "umbrella" clause, the court in essence took away from the parties to the agreement the rights with regard to which they had specifically agreed, and gave to the government an unfair advantage which was not provided to the assignor, the party from whom the government's right of collection derived.

Thus, in light of the circumstances presented, the District Court and the Court of Appeals whose decisions did not apply the law mandated by this Honorable Court in *United States v. Yazell*, supra, effected a substantial injustice to Kurtz, and subjected a contract, which was clear in its terms, to a metamorphosis which permitted it to be changed at the whim of the party attempting to enforce it. Certainly, the government would not dispute the fact that if Guardian had, instead of making demand upon SBA, sought to enforce the contract against Kurtz, or if the government had subsequently reassigned the contract to a private entity, California Law would apply. However, the government does contend that because it paid the amount due on the loan and "bought" the rights which Guardian possessed and was attempting to enforce these rights, that those rights in some way became different in nature, and subject to a set of rules and stat-

utes different from those provided by the agreement. This was certainly never the intent of the parties and certainly this was never contemplated by this Honorable Court when it stated in *Lynch v. United States*, 292 U.S. 571, 78 L.Ed 1434 (1933):

> "When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Thus, the government, just as any private entity may not change the terms of an agreement after it has been assigned. See also, *Hollerbach v. United States*, 283 U.S. 165, 58 L.Ed 898 (1915); *United States v. Standard Rice Co., Inc.*, 363 U.S. 106, 89 L.Ed 104 (1944); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 69 L.Ed 907 (1924).

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 59 L.Ed 2d 711 (1979), this Honorable Court was again faced with a situation similar to the instant case. In *Kimbell*, the issue was, should the lien priority laws existing in the state of Texas be applied to bar a claim by the government arising from an SBA transaction. In that case, the government sought the Court's protection from the adverse affect which different laws of various states could possibly have upon an SBA obligation. Thus, as here, the Government advocated the adoption of a national policy on priority of liens which would elevate Government liens derived from SBA obligations to positions superior to those perfected in accordance with state laws. This Honorable Court, in *Kimbell* declined to fashion a uniform or national rule as requested by the government and expressed great concern over any action by the government which would be disruptive of relations premised upon state commercial statutes. As it did in *Yazell*, this Honorable Court made certain observations which are applicable to this case. First, it was noted that the SBA operations concerning loan transac-

tions were adapted in great detail and with specific reference to State law. id., 440 U.S. 729-730; 59 L.Ed 2d 725. Second, the SBA's employees were instructed to comply with state law and did in fact, make use of local offices and employees familiar with the law of the locality involved id. 440 U.S. 729-730, 732; 59 L.Ed 2d 725-726. Third, this Honorable Court placed significant emphasis upon the need to avoid the disruption of the laws upon which private creditors rely in their affairs, id., 440 U.S. 729; 59 L.Ed 2d 725. Finally, the Court noted the need for stability and reliability in financial transactions. id. 440 U.S. 739, 740; 59 L.Ed 730-731.

The decisions of the Courts below in this case are not in accord with this Court's decision in *Kimbell*. Moreover, the effect of the decisions below operate to undercut the policy of stability and reliability which this Court attempted to foster in *Kimbell*. Certainly there can be no sense of stability or reliability where Government guaranteed loans are involved, when the government is permitted unilaterally to change the terms of agreements entered into by private individuals under SBA supervision and with its approval. Such a standard advocated by the government and applied by the District Court and Court of Appeals should not be condoned.

The government, when it comes into the area of commercial finance, enters the marketplace in the same way as any commercial lender. Its rights and duties with regard to financial transactions in which it may engage are governed by the same laws of contracts which govern private entities. *Lynch v. United States*, 292 U.S. 571, 78 L.Ed 1434 (1933); *Hollerback v. United States*, 233 U.S. 165, 58 L.Ed 898 (1913); *United States v. Standard Rice Co., Inc.*, 323 U.S. 106, 89 L.Ed 104 (1944); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 69 L.Ed 907 (1924). The government, simply by virtue of its status as the government, or by the size of the transactions undertaken and the risks involved is entitled to no greater protection than that accorded ordi-

nary lenders. *United States v. Kimbell Foods, Inc.*, supra, at 440 U.S. 337. *United States v. Yazell*, supra, at 382 U.S. 347 Fn. 13.

Therefore, in light of the circumstances presented in this case, it is respectfully submitted that the Court of Appeals and the District Court have rendered determinations in this case in clear conflict with the pertinent decisions of this court, and thus, review of this case upon Certiorari is warranted.

II. The decisions of the Courts below that Kurtz as a Guarantor was a "debtor" under the California Uniform Commercial Code for certain purposes and not for other purposes was arbitrary and in direct conflict with holdings of other Circuits which have decided this question and with the policy of California Courts.

In the District Court, Kurtz raised a defense based upon section 9-504(3) of the California Uniform Commercial Code.* Kurtz's defense in this regard challenged the "commercial reasonableness" of the SBA's liquidation of Arnold's assets in November of 1972. Kurtz contended also that (1) he was not provided with notice of the sale of the assets as required by the code; and, (2) the manner in which the sale was conducted did not conform with the standards set forth in the code.

At first, no one disputed the applicability of California law to this case and to this issue. Thus, during discovery, the government stated in its answers to Interrogatory 21 (A-44):

> "All collateral pledged by Arnold's Cleaners, Inc. was exposed for public auction sale pursuant to the *Uniform Commercial Code, as adopted in the State of California* . . ." (Emphasis Supplied)

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*Section 9-504(3) is reproduced in its entirety at A-101.

However, when the government was challenged for its failure to comply with the terms of the California Uniform Commercial Code, for its failure to give Kurtz notice and for its failure to conduct the sale properly, the government, as it did with regard to the statute of limitations, sought a more favorable federal statute behind which it could shield itself and legitimize its tactics. This time though, there was no federal statute which the government could apply, and so the government sought to do the next best thing, by formulating a statute that would apply. Thus, the government advocated that the District Court formulate a standard which would specifically address the situation in a manner favorable to its position through application of a generalized commercial law premised upon the Uniform Commercial Code in general, without specific reference to any state.

The District Court denied in principal, the theory advocated by the government but through a convoluted analysis of the California Uniform Commercial Code protected the Government's interests and circumvented the direct application of the California Code to this case.

The District Court ruled that the California Code was applicable in determining the propriety of the SBA's liquidation of collateral. The Court, thus, found that Kurtz, as a "guarantor" of the obligation owed by Arnold's, was a "debtor" as defined by the Code*, and that Kurtz had standing to raise the defense of "commercial unreasonableness" contained in §9-504(3). However, the District Court then ruled that Kurtz was not considered a "debtor" with regard to the provisions of the Code prohibiting waiver of the protections of §9-504(3). Thus, the guaranty agreement (A-75) executed by Kurtz was construed by the Court as a waiver of the rights provided by that part of the code. It is respectfully submitted

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* "Sec. 9-105 of the Code defines a debtor as follows:

> . . . [T]he person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral."

that such a finding was neither premised upon the facts of this case, nor upon the applicable law and was clearly arbitrary.

Section 9-501(3) of the California Uniform Commercial Code specifically prohibits the contractual waiver by a debtor of the express protections afforded debtors by §9-504(3)*. Hence a simple analysis of the terms of the Code would render a finding that Kurtz, being a "debtor" as defined in the Code, is entitled to the protection afforded "debtors" by virtue of §9-501(3)(b). Ergo, Kurtz could not waive the benefits of "commercial reasonableness" provided by §9-504(3). The District Court could, and should, have made the determination from specific reference to the Code provisions. However, the Court did not, and made its finding based upon a blind choice among holdings of other courts which were split in favor of and against Kurtz's position. In fact, the decision of the District Court was in direct conflict with the decision rendered by Judge Giles of the same Court one year earlier in *U.S.A. v. Chatlin's Department Store*, 506 F.Supp. 108 (E.D. Pa., 1980) In *Chatlin's*, the government claimed just as it did in this case, that by executing the guaranty agreement, the guarantors waived the defenses provided by §9-504(3) of the Code. The Court found to the contrary based upon holdings of Circuits which had ruled upon substantially similar cases. Thus, the Court stated:

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* §9-501(3) of the California Uniform Commercial Code states:

> (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to redemption of collateral (Section 9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
>
> * * *
>
> (b) Subdivision (3) of Section 9504 which deals with disposition of collateral; (A-99)

"The district court in O'Brien* held that by signing the unconditional guaranty agreement, the Defendants waived absolutely all their rights to preservation of collateral. The Court, however, did not treat the policy considerations above, and did not acknowledge the Circuit Court decisions in Willis, Conrad and Terrey**. Those decisions did not construe the guaranty agreement as an absolute waiver of any and all defenses. Rather, each stressed that the commercial understanding of the term "unconditional guaranty" is that it is a limited term. That is, in the trade, the term denotes only that no duty is imposed on the creditor to attempt to collect from the primary obligor prior to attempting to collect from the individual guarantor." id. 506 F.Supp 111.

The Court in *Chatlin's*, recognizing the manifest unfairness presented by an adoption of the government's position on waiver went further to state, quoting from *United States v. Willis*, 593 F.2d 247, 255 (6th Cir. 1979)

"[A]s a matter of federal law, even the broad language [of the unconditional guaranty agreement] will not be deemed to relieve the SBA of any and all responsibility to debtors in disposing of collateral securing its loans. This Court cannot and will not sanction the kind of economic waste and financial hardship the government's interpretation of the language has the potential of bringing about . . . the discretion inferred [by the agreement] was never intended to be boundless. . ."

The decisions of the Courts below in this case being directly contrary to the decision of the Court in *Chatlin's*, and the cases cited therein, create a conflict

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* *United States v. O'Brien*, No. 77-C-559 (E.D. Wis. 2/2/79)

** *United States v. Willis*, 593 F. 2d 247 (6th Cir., 1979), *United States v. Conrad Pub. Co.* 589 F.2d 949 (8th Cir., 1978); *United States v. Terrey*, 524 F.2d 685 (5th Cir., 1977).

with the Fifth, Sixth, and Eighth Circuits as to the proper resolution of the issue presented.

It is respectfully submitted that the District Court should have applied the statutory language of the Code which was clear and unambiguous and which, if applied, would have mandated a finding that Kurtz, by law, could not waive his rights to protection afforded by §9-504(3). Moreover, since the law of the state of California was deemed applicable to the resolution of this issue, the Courts below should have applied the law as a California State Court would have. There was sufficient California case law to support a finding that Kurtz could not waive these rights. Although no California Court (in any reported decision) ever squarely addressed this issue, the decision of the California State Appellate Court in *Barber v. LeRoy*, 40 Cal App 3d 366, 115 Cal Rptr. 272 (1974) was pertinent. In that case, the Court refused to enforce a provision in a security agreement waiving a prohibition in §9-504(3) against purchase of collateral by the secured party at a private sale. The Court reasoned that such a waiver prior to default violated §9-501(3) and was against public policy. The Court stated, at 40 Cal. App. 3d 344, 115 Cal Rptr. 277-278:

> "We further hold that the language of the security agreement which constitutes a waiver of the provisions of §9-504(3) constitutes a violation of §9-501(3), is therefore contrary to public policy and consequently it is void."

In its analysis of the Uniform Commercial Code, the Court in *Barber v. LeRoy*, supra, stated quite succinctly:

> "Section 9-504(3) requires not only notice to the debtor, but that the sale of collateral be conducted in a 'commercially reasonable manner' and those are two of the duties imposed upon the secured party which §9-501(3) provides may not be waived in advance."
>
> id. 40 Cal. App. 3d 342-343; 115 Cal. Rptr. 277.

This analysis should have been applied in the instant case. When the SBA was not repaid in full by Arnold's, for all intents and purposes, and by virtue of the provisions of §9-105 of the Code, Kurtz became the debtor. He was the party who became obligated to satisfy the obligations of Arnold's. The duties imposed upon the SBA with regard to notice and "commercial reasonableness" could not vary depending upon the identity of the debtor, and thus those duties were owed to Kurtz. The government was obliged to comply with the clear mandate of §9-504(3); to notify Kurtz of the sale and to conduct the sale in a "commercially reasonable" manner. Kurtz could not, prior to default by Arnold's, lawfully waive those duties which were imposed upon the SBA by the Code. Therefore, the Courts' determination in this case that Kurtz waived the protections of §9-504(3), was erroneous and in clear contravention of public policy adopted by the State of California and of the specific terms of the Uniform Commercial Code which governed in this case.

The decision rendered by the District Court and by the Court of Appeals in this case are not only erroneous but have created a conflict among various circuits with regard to the interpretation of the Uniform Commercial Code, which can be corrected only by this Honorable Court's review.

III. The Opinion of the District Court which was affirmed on appeal included certain findings of fact which were made on crucial and disputed issues without any evidence having been presented and thus the granting of Summary Judgment in favor of the Government violated Federal Rule of Civil Procedure 56.

In granting the government's motion for Summary Judgment, the District Court ruled without the benefit of any evidence, but simply upon the arguments of counsel. However, there were certain findings made by

the court which required a hearing. For example, Kurtz asserted as one of several alternative arguments, that Arnold's had not made all of the required payments to Guardian between September 1969, and January 1970 and that his liability by the terms of the guaranty agreement was triggered by Arnold's non-payment. Therefore, once Arnold's defaulted (i.e. failed to pay timely), Kurtz became liable automatically and without regard to demand.* Therefore, Arnold's having defaulted between September 1969 and January 1970, Kurtz's liability arose at that time. Thus, regardless of which limitations provision (state or federal) the Court chose to apply, the Government's claim would be time barred since its suit was not started until more than six (6) years later, on February 3, 1976.

The District Court did not and could not determine from the record before it and without a trial, the date upon which Kurtz's liability and the Government's claim came into being. Thus, the Court skirted the issue and found (without any evidence) that the cause of action accrued before the government made demand for payment on May 5, 1975, but not before February 3, 1970. (A-8)

How did the Court fix the date, February 3, 1970? Upon what evidence did the Court rely to make such a finding? Obviously, the date was chosen for convenience, to obviate a hearing on the issue. There was no evidence to support such a finding or to rebut Kurtz's contention which was supported by his affidavit (A-86) that the date of default occurred earlier than February 1970.

Thus, Summary Judgment should not have been granted in favor of the government. The issue of when the claim arose constituted a question of material fact

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*The guaranty agreement expressly provided that the secured party had no obligation upon default by the debtor to exhaust its remedies against any other parties before seeking repayment from the guarantor. (A-77)

which was still an issue to be resolved and which was never free from doubt. Fed.R.Civ.Pro. 56(c). Moreover, the only evidence before the Court on the issue, namely, Kurtz's affidavit (A-85) having been unrebutted by the government, would have necessitated a finding by the Court of a default having occurred prior to February 1970. Such a finding would ultimately have resulted in the complete bar of the Government's action, or at the very least, a bar to Summary Judgment for the Government. However, the District Court's arbitrary finding completely disregarded this evidence.

One further example of the District Court's imprudent granting of Summary Judgment in this case should be noted. The District Court, although finding that Kurtz had waived the protections of §9-504(3) of the Code stated in its opinion:

> "The Guarantor does have rights 'by reason of any deterioration, waste, or loss by fire, theft or otherwise of any of the collateral . . . caused by the wilful act or wilful failure to act of bank'. But there are no allegations of such wilful behavior here." (A-24)

To the contrary, Kurtz alleged in his answer to the Complaint (A-35, A-36):

> **"NINTH AFFIRMATIVE DEFENSE**
> Plaintiff's cause of action is barred because Plaintiff and its assignor acquiesced in the dissipation of the assets which were the security for the loan"
>
> **"FIFTEENTH AFFIRMATIVE DEFENSE**
> Plaintiff and its assignor conspired with others and did, with others, engage in acts which defrauded Defendant"

In addition to these affirmative defenses, Kurtz raised a counterclaim against the government alleging wilful misconduct on the part of the government in connection with the protection and preservation of the collateral securing the loan. (A-37, A-38). Apparently, these

allegations, were simply ignored. Kurtz had complied with the very terms set forth in the Court's opinion. Kurtz had these defenses available and he did in fact raise them. Thus, there should have been a hearing to determine their sufficiency. They should not have been ignored as they were by the District Court and by the Court of Appeals. Kurtz respectfully requests this Court to review these defenses which have thus far fallen upon deaf ears.

IV. CONCLUSION

A Writ of Certiorari should issue to review the Judgment Order of the Court of Appeals for the Third Circuit.

Respectfully Submitted

WILBUR GREENBERG
ALBERT J. OLIZI, JR.
Attorneys for Petitioner,
MORRIS I. KURTZ

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1982, three true and correct copies of the Petition for Writ of Certiorari were served by First Class Mail, Postage Prepaid, to the following:

JAMES G. SHEEHAN
Assistant United States Attorney
3310 United States Courthouse
601 Market Street
Independence Mall West
Philadelphia, Pennsylvania 19106

I further certify that all parties required to be served have been served.

ALBERT J. OLIZI, JR.
Attorney for Petitioner,
MORRIS I. KURTZ

82-590

No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1982

MORRIS I. KURTZ,

Petitioner

v.

UNITED STATES OF AMERICA
on behalf of its agency
THE SMALL BUSINESS ADMINISTRATION,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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FOR THE THIRD CIRCUIT

No. 81-2974

UNITED STATES OF AMERICA, on behalf of its agency
THE SMALL BUSINESS ADMINISTRATION

v.

MORRIS I. KURTZ,

Appellant

(Civil No. 76-00313 — E.D.Pa.)

Argued July 6, 1982
Before SEITZ, *Chief Judge*,
VAN DUSEN and SLOVITER, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby essentially for the reasons set forth in its opinion reported at 525 F. Supp. 734 (E.D.Pa. 1981).

Costs taxed against appellant.

By the Court,

_____
Chief Judge

Attest:

_____
Sally Mrvos, Clerk

Dated: July 7, 1982

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA on behalf of its Agency, THE SMALL BUSINESS ADMINISTRATION	:	CIVIL ACTION
v.	:	
MORRIS I. KURTZ	:	No. 76-313

OPINION AND ORDER

EDWARD R. BECKER, *J.* October 29, 1981

I. *Introduction*

This action, brought by the United States to enforce the guaranty on a defaulted $400,000.00 loan made under the Small Business Administration (SBA) loan guaranty program, is before us on the parties' cross-motions for summary judgment. We first heard argument on the Government's motion for summary judgment in early 1979, and, by order filed May 17, 1979, denied that motion without opinion. However, after defendant Morris I. Kurtz filed a summary judgment motion on April 23, 1980, the Government reinstated its motion, noting that the defendant had changed his position as to whether the case turned on issues of material fact, in contradistinction to issues of law.[1] After additional briefing, reargument, and further reflection, the summary judgment motions are now ripe for disposition.[2] For reasons that we discuss at length, we will grant the Govern-

1. We need not comment here on the extent to which defendant's current position differs from his position prior to our May 17, 1979, order, because that order is, in any event, subject to reconsideration.

2. Our delay in deciding these motions was occasioned by our involvement in the Japanese Electronic Products Antitrust Litigation, M.D.L. 189.

ment's motion and deny defendant's motion. We turn first to a description of the factual record before us.

II. *The Facts*

On April 11, 1969, Arnold's Cleaners, Inc. ("Arnold's"), a California corporation engaged in the dry cleaning business in Los Angeles, entered into a loan agreement with the Guardian Life Insurance Company of America ("Guardian"). The loan was secured by a promissory note in the amount of $400,000.00 with interest at 8% per annum. The proceeds were used primarily to enable Arnold's to enter the industrial uniform rental business under the name Allstate Uniforms. Defendant, who was the president and sole shareholder of Arnold's, personally guaranteed the full amount of the loan. The loan package also included an undertaking by the SBA to guarantee repayment of the loan to Guardian.[3] Arnold's pledged its business machinery, fixtures, furniture, equipment, and after-acquired property as collateral for the loan. The collateral then in existence was appraised twice at the time the loan was made: once by H. B. Okey, an SBA employee, and once by an outside firm identified in the record only as "Tait." Okey valued the collateral at $237,500.00, while Tait appraised the

3. The SBA contends that it agreed to guarantee 90% of $400,000.00; defendant asserts that the SBA guaranteed only 87½% of $350,000.00. This discrepancy is irrelevant to the determination here of the amount of defendant's liability because Kurtz guaranteed the entire $400,000.00 loan. Neither the Government nor defendant has suggested that the discrepancy creates a question as to whom the defendant is liable, though we note that in 1971 at the time of Arnold's reorganization under the Bankruptcy Act, the SBA held jointly with the Imperial Bank of Los Angeles, California, a note in the amount of approximately $379,000.00, which represented the then current balance of the $400,000.00 loan. In the absence of any contrary representations by defendant, we accept the Government's implicit position that it is entitled to collect the full amount defendant is found to owe under the guaranty.

same property at a value between $275,500.00 and $290,000.00.

Arnold's was unable to make all its required payments to Guardian between September 1969 and January 1970. On December 14, 1970, because of Arnold's continuing failure to meet its obligations as they came due, Guardian made demand on the SBA for payment of the guaranteed portion of the loan. The SBA honored Guardian's demand, and, on December 17, 1970, Guardian assigned to the SBA the right to collect from Arnold's on its note or from defendant on his guaranty.

Shortly thereafter, Arnold's filed a Petition for Arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701-99 (repealed Oct. 1, 1979),[4] in the United States District Court for the Central District of California, Arrangement No. 84436. The United States timely filed its proof of claim on behalf of the SBA on May 7, 1971. On June 11, 1971, Arnold's filed a Plan of Arrangement ("Plan") for approval by the court. The Plan divided Arnold's into two separate business operations, "spinning off" the unifrom rental business operated under the fictitious name of Allstate Uniforms. Under the Plan, the SBA agreed to release any security interest it held in the assets of Allstate Uniforms and in after-acquired property of Arnold's, and to accept an undertaking by the reorganized debtor to assume and pay the debt owed to the SBA according to a specified schedule. The SBA retained its security interest in the assets of the diminished Arnold's dry cleaning operation.

The Plan required defendant to transfer all of his interest in Arnold's to four named buyers, who were to fund the arrangement by depositing $60,100.00 in escrow with the receiver. The Plan fixed the sum payable by the reorganized debtor to the secured creditors[5] at

4. Subsequent references to provisions of the Bankruptcy Act are to the old act, unless otherwise indicated.

5. The secured creditors included the SBA and Imperial Bank. *See* note 3 *supra*. We will make no further reference to Imperial

$379,112.32, plus 6% interest per annum on the unpaid balance from the date of confirmation.[6] The Plan further provided that the creditors would be paid in monthly installments equal to the greater of one half of the net profits earned by the reorganized Arnold's and the amount fixed by a specified payment schedule, until the balance was paid in full. According to defendant's affidavit, the Plan ultimately was accepted by the court and by Arnold's creditors, including the United States, over defendant's "most strenuous objection."

The reorganized debtor made payments totalling $1,750 to the SBA between December 1971 and April 1972. In the latter month the reorganized debtor ceased operations; it made no further payments to the SBA. Arnold's assets were liquidated by sale at auction, without notice to defendant, in November 1972. From the proceeds, the sum of $7,867.88 was credited to Arnold's account with the SBA. On May 8, 1975, on the basis of the guaranty executed in 1969, the SBA made written demand on defendant[7] for payment of the deficiency. Defendant failed to pay, and on February 3, 1976, the United States filed this suit on behalf of the SBA.

In the guaranty that he executed in his personal capacity, defendant agreed to make whole the lender on the event of Arnold's default. The guaranty contract provided that defendant "unconditionally" guaranteed payment of principal and interest according to the terms of the loan agreement, and that defendant would pay the amount due and owing "immediately" on written de-

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NOTE 5 — *(Continued)*

Bank as joint secured creditor with the SBA because neither the Government nor defendant place any significance on Imperial Bank's role in the bankruptcy reorganization. No information has been offered as to any present interest Imperial Bank may have in Arnold's note or defendant's guaranty.

6. The Plan was confirmed on October 28, 1971.

7. Defendant had since moved his residence to Elkins Park, Pennsylvania.

mand. Further, defendant by the agreement granted to the lender full discretion to deal with the collateral, without notice to him, including power to modify, extend, or excuse terms of the promissory note. The guaranty contract gave the lender the following powers:

> To consent to the substitution, exchange, or release of all or any part of the collateral, whether or not the collateral, if any, received by Bank upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by Bank;
>
> In the event of nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as Bank may elect, at any public or private sale or sales, for cash or on credit or for future delivery, without demand, advertisement or notice of the time or place of sale or any adjournment thereof (the undersigned hereby waiving any such demand, advertisement and notice to the extent permitted by law), or by foreclosure or otherwise, or to forbear from realizing thereon, all as Bank in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.
>
> The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against Bank by reason of any action Bank may take or omit to take under the foregoing powers.

* * *

> The undersigned shall have no right of subrogration whatsoever with respect to the Liabilities or the collateral unless and until Bank or SBA shall have received full payment of all the Liabilities.
>
> The obligations of the undersigned hereunder, and the rights of Bank in the collateral, shall not be released, discharged or in any way affected, nor shall the undersigned have any rights against Bank . . . by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of Bank.
>
> • • •
>
> The undersigned further agrees that all liability hereunder shall continue notwithstanding payment by SBA under its Guaranty Agreement to Bank.[8]

III. *The Contentions of the Parties*

The SBA urges that it is entitled to summary judgment because defendant's guaranty was conditioned only on the debtor's default and the making of a written demand for payment, and these two conditions have been fulfilled. Defendant, raising four major affirmative defenses, asserts that he, and not the Government, is entitled to summary judgment. He contends first that this action is barred by the four-year California statute of

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8. Included among the documents filed with Defendant's Motion for Summary Judgment on April 23, 1980, are the Authorization Approving Insurance Company's Request for SBA Guaranty, Guaranty Agreement (between SBA and Guardian), Loan Agreement, Note, Supplement to Loan Agreement and Note, Kurtz Guaranty, and Pledge Agreements. All of these documents except the Supplement and Pledge Agreements were SBA standard forms. Also filed were documents related to the bankruptcy proceeding in 1971: Proof of Claim of the United States of America, Plan of Arrangement, Interlocutory Order of Confirmation, and Final Order of Confirmation.

limitations. Cal. Civ. Pro. Code §337(1). Second, he characterizes the SBA's participation in the Chapter XI proceedings as an undertaking to look solely to the reorganized debtor for repayment of the laon, so that the Government is estopped from suing on the guaranty. Third, he maintains that the Plan confirmed by the bankruptcy court in October of 1971 constituted an accord and satisfaction of the original obligation of Arnold's to the SBA, so that the guaranty accompanying the original note is without continuing legal effect. Finally, he argues that even if the Government's action is not time-barred and even if the guaranty is otherwise enforceable, the SBA did not dispose of Arnold's assets in a "commercially reasonable" manner as required by the Uniform Commerical Code, Cal. U. Com. Code §9504. He insists that if the SBA had obtained the reasonable value of the collateral by sale, the full amount of Arnold's remaining obligation would have been realized.[9]

To these defenses, the Government replies that the suit was filed within the six years allowed by the federal statute of limitations, 20 U.S.C. §2415, but that even if California rather than federal law applies to this issue, the suit was timely filed. Second, the Government asserts that the Chapter XI proceeding did not alter in any way defendant's obligation as guarantor of the loan to Arnold's. Finally, the Government disputes defendant's conclusion that the California Uniform Commercial Code applies to this case, but argues also that the SBA's action conformed to its requirements.

IV. *Discussion*

A. *Statute of Limitations*

Defendant contends that this action, which was filed on February 3, 1976, is time barred because Cali-

9. Defendant has listed numerous other affirmative defenses and elements of cross-claims and counterclaims, but neither briefed nor argued them. We consider these claims and defenses abandoned and do not address them in this opinion.

fornia law prescribes a four-year limitation period. Cal. Civ. Proc. Code §337(1). The Government counters that the applicable statute is federal, so that the limitation period is six years. 28 U.S.C. §2415. The parties also disagree about the date on which the cause of action accrued,[10] but our disposition of the choice of law question makes unnecessary determinaiton of the exact date.[11]

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10. Defendant argues that the cause of action accrued when Arnold's first failed to make timely payments to Guardian, so that the action is barred even under the federal statute of limitations. He states in Paragraphs 6 and 7 of his affidavit that between September 1969 and January 1970 Arnold's did not make all required payments, and that an agent of Guardian told him in the latter part of January 1970 that Arnold's account was in arrears. We disagree that a cause of action arose at that time, because by the terms of the guaranty Kurtz was not obliged to pay until he received a written demand from Arnold's obligee. Normally, the cause of action would not accrue until the guarantor dishonored the demand. To avoid an indefinite suspension of the statute of limitations following a default on the original loan (the necessary antecedent to guarantor's liability), some courts have held that a demand must be made within a "reasonable time" thereafter. *See, e.g.*, Nyhus v. Travel Management Corp., 466 F.2d 440 (D.C. Cir. 1972). Certainly a few months' delay in making a demand on defendant as guarantor would have been reasonable under the circumstances. Because such a delay would have brought this action within the limitations period, we do not find it necessary to determine precisely when the cause of action arose. It is sufficient to conclude that it would have accrued on or before May 8, 1975, when written demand was made, but not earlier than February 3, 1970.

Additionally, defendant suggests that in any case the satute began to run no later than December 17, 1970, the day that Guardian assigned Arnold's obligation to the SBA. This date is, of course, less than six years before the date this action was commenced, and we need not address this argument further. We add that although a five-year delay in making demand does not suggest much diligence or alertness, it may be that, given the hope of recovery from the Chapter XI proceedings, the Government would have been justified in delaying until mid-February 1972 — and if so, not even the four-year California statute would be a bar.

11. In addition to pressing for the choice of state over federal law, defendant presents a well reasoned argument for the choice of California law over that of the forum state, Pennsylvania, citing the

We agree with the Government that the federal six-year statute applies.

In favor of our choosing the California statute of limitations, defendant argues that *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and its precursors require the application of state law to determine the rights of the SBA in litigation arising from its loan transactions. *Kimbell Foods*, the most recent Supreme Court decision addressing the application of state law to federal loan programs, concerns the relative priorities of contractual liens arising from federal programs and private transactions. Justice Marshall, writing for a unanimous court, observed at the outset that "[t]his Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." 440 U.S. at 726. *See United States v. Yazell*, 382 U.S. 341 (1966); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). The Court had no difficulty concluding that federal law controlled the SBA's rights. The "more difficult task" in *Kimbell Foods*, 440 U.S. at 727, because no federal legislation was applicable to the issue in that case, was to articulate the federal rule. The Court's decision whether to adopt state law for that purpose or to shape a uniform nationwide rule turned on its consideration of three factors:

> [the] need for a nationally uniform body of law, . . . whether application of state law would frustrate specific objectives of the federal programs . . . [and] the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

Restatement (Second) of Conflict of Laws §188 (1971). The Government does not address the choice between California and Pennsylvania law. Therefore, to the extent that state law is applicable to this case, we accept defendant's position that California's is the applicable state law.

Id. at 728-29. It is these policy considerations that defendant maintains dictate resort to the California statute of limitations in the case before us.

In *Kimbell Foods*, the Court, following *Clearfield Trust*, looked to state law only after determining that no federal statute supplied the federal rule of decision. In this case, however, there is a relevant federal statute of limitations, 28 U.S.C. § 2415, which supplies the federal rule and renders recourse to state law unnecessary and inappropriate. This statute provides that

> [E]very action for money damages brought by the United Statest or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues.

Under *Kimbell Foods*, the federal statute is controlling and the limitations period for this action is six years.

This result is consistent with the traditional rule that the United States is not subject to local statutes of limitations unless it has consented to the application of those statutes. *See, e.g., United States v. Kellum*, 523 F.2d 1284, 1286 (5th Cir. 1975) (citing cases); *United States v. Cardinal*, 452 F.Supp. 542 (D.Vt. 1978) (discussing legislative history of § 2415). In *United States v. Framen Steel Supply Co.*, 435 F.Supp. 681 (S.D.N.Y. 1977), on which defendant places much reliance, the court held that the four-year statute of limitations in U.C.C. Article 2, as enacted by Congress for the District of Columbia, D.C. Code Ann. § 2-725, applied to actions brought by the federal government. That holding is not pertinent here because that decision turned on the enactment of the District of Columbia statute by *Congress*, rather than by a state legislature.

The defendant next argues that the SBA consented to the application of the four-year California statute in any action brought on the basis of the loan transaction

involved here.[12] He directs us to a document entitled "Supplement to Loan Agreement and Note," which provides in Paragraph 8.4 that "[t]his agreement is being delivered and is intended to be performed in the State of California and shall be construed and enforced in accordance with the laws thereof." This Supplement was executed by Guardian and by defendant for Arnold's; although the SBA did not sign it, defendant offers evidence from the deposition of the SBA's attorney to the effect that the document was reviewed and approved by the agency without objection to the reference to California law. However, the Supplement also provides, in paragraph 7, that "[i]t is not intended that any of the terms or conditions recited herein be inconsistent with the provisions of the Small Business Act or any rules or regulations promulgated thereunder or inconsistent with any other law applicable to this transaction." In view of this "umbrella" clause, we will not construe the quoted clause of paragraph 8 as consent on the part of the SBA to be subject to the shorter four-year California statute of limitations when the federal statute sets a six-year limit.

Finally, defendant contends that the Government, as Guardian's assignee, stands in Guardian's shoes and is subject to the same statute of limitations that would have applied had Guardian brought this suit. It is generally true that "assignment of a claim to the United States cannot give such claim any greater validity than it had in the hands of the assignor." *United States v. Taylor*, 144 F.Supp. 15, 17 (E.D.Pa. 1956) (Van Dusen, J.). Further-

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12. Although some courts have held that a government agency may adopt by contract a statute of limitations other than 28 U.S.C. § 2415, *see* United States v. Framen Steel Supply Co., 435 F.Supp. 681, 683-84 (S.D.N.Y. 1977) (citing cases), Judge Weinfeld has expressed doubt that an agency is authorized to adopt a shorter statute of limitations than Congress has provided. *See* United States v. Yale Transport Corp., 184 F.Supp. 42, 46 n.13 (S.D.N.Y. 1960). However, we need not and do not reach this question here.

more, if the Government acquires a claim after the statute of limitations has *already* run against the assignor, the claim is barred because it was worthless when assigned. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938); *United States v. Taylor*, 144 F.Supp. at 17. However, it is well established that if the Government is assigned a claim before the statute of limitations has expired against the assignor, the Government is thereafter subject *only* to the federal statute of limitations. *See United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Cardinal*, 452 F.Supp. at 543 n.1; *United States v. Taylor*, 144 F. Supp. at 17 n.8. Because Guardian assigned defendant's guaranty to the SBA before the expiration of the California limitations period, the SBA's claim is governed by the six-year federal statute.

For the foregoing reasons, 28 U.S.C. § 2415 is the statute of limitations applicable to this action. Because the cause of action accrued no earlier than February 3, 1970, *see* note 10 *supra*, the action is not time barred.

B. Effect of the Chapter XI Proceeding on Defendant's Obligation

The defendant contends that the conduct of the SBA during the Chapter XI reorganization of Arnold's in 1971 and the nature of the arrangement to which the SBA consented bar the Government's recovery now on defendant's guaranty. We disagree.

At the outset, we note that the simple fact of the SBA's participation in Arnold's reorganization does not foreclose the Government's current collection efforts. At the time of the Chapter XI proceedings, the Bankruptcy Act provided that "[t]he liability of a person who is a co-debtor with, or a guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." 11 U.S.C. §34.[13] This rule of law was made

13. The corresponding section of the current Bankrupty Code is 11 U.S.C. §524(e).

applicable to Chapter XI proceedings by Section 702 of the Act. The confirmation of the Plan of Arrangement discharged the debtor, Arnold's, on those obligations that were provided for in the Plan. 11 U.S.C. §771. The language of the statute makes clear that although confirmation of the Plan discharged *Arnold's* debt to the SBA and transferred *Arnold's* obligation to the reorganized debtor, it did not affect defendant's liability on his guaranty.

The United States Court of Appeals for the Fifth Circuit applied this principle in a case that was similar in its facts to the case at bar. The defendant in *R.I.D.C. Industrial Development Fund v. Snyder*, 539 F.2d 487 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977), had guaranteed two debts owed by Sunnyhill Research and Manufacturing Company to plaintiff. Sunnyhill subsequently was reorganized in a Chapter XI proceeding. The plaintiff did not receive the full amount of the debts owing to it in that proceeding, and thereafter brought suit against the guarantor for the unsatisfied portion of the original debt. The Fifth Circuit held that the arrangement did not diminish the responsibility of Sunnyhill's guarantors to satisfy the remaining unpaid portion of the guaranteed debts, observing:

> One of the principal purposes for obtaining a guarantor to a note is to provide an alternative source of repayment in the event that the principal obligor's debt is discharged in bankruptcy. Accordingly, the Bankruptcy Act provides that discharge in bankruptcy will not alter the liability of a guarantor.

539 F.2d at 491 (footnote omitted).

Characterizing the SBA's participation in the Chapter XI proceedings as an agreement to look solely to the reorganized debtor for payment of Arnold's debt and describing the SBA's subsequent demand on Kurtz as an attempt to circumvent the Bankruptcy Act and other

laws under which the Plan was developed, the defendant next contends that the Government is estopped from pursuing him. Moreover, he argues, the nature of the Plan that the SBA approved demonstrates that it constituted an accord and satisfaction of the full amount of Arnold's debt. We do not find these arguments persuasive.[14]

Setting aside the question whether, or with what special qualifications, the traditional defense of estoppel will lie against the Government,[15] we do not see how the estoppel doctrine is applicable. The record before us on the motions for summary judgment does not contain any allegations of the basic elements of estoppel, and the defendant proffers no evidence to support such allegations. The defendant does not allege, nor does careful inspection of the record reveal, any evidence of concealment or misrepresentation of fact by the SBA, or any express or implied promise by the SBA to forego the exercise of its rights against the guarantor.

The defendant's estoppel argument rests primarily on Section 3-606 of the U.C.C. as codified in California

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14. Our disposition of these defenses, which are based on California law, makes it unnecessary for us to decide whether the principles announced in *Kimbell Foods*, see page 10 *supra*, would dictate that state law be adopted as the federal rule of decision on these issues.

15. The Government asserts that because defendant has alleged no affirmative misconduct by the United States, his estoppel argument must fail. The Government relies on a line of cases holding that "estoppel requires proof of affirmative misconduct on the part of the Government," Yang v. Immigration & Naturalization Serv., 574 F.2d 171, 175 (3d Cir. 1978); that such affirmative conduct is often "outside the scope of the agent's authority" and does not work an estoppel against the United States, Housing Auth. v. Envirohousing, Inc., 442 F.Supp. 1193 (M.D.Pa. 1977); American Training Serv., Inc. v. Veterans Administration, 434 F.Supp. 988 (D.N.J. 1977); and that estoppel by mere conduct or failure to act may never be invoked against the United States, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

and on Section 2819 of the California Civil Code.[16] Defendant reads these provisions to have required the SBA to obtain defendant's consent to the Plan and to the SBA's subsequent acts, particularly the liquidation of Arnold's assets in November 1972, at pain of discharge of his obligation. This contention if frivolous. Defendant's U.C.C. argument is without merit because the guaranty that is the basis of this action is not a negotiable instrument within the meaning of Section 3104 of the California U.C.C.; therefore, Section 3606 is not applicable.[17] An estoppel defense based on Section 2819 fails for two reasons. First, that provision conflicts with the provisions of the federal Bankruptcy Act. As we have

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16. Section 3606 provides in pertinent part:

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder.

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recorse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure to delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

Cal. U. Com. Code § 3606

Similarly, Section 2819 provides:

A Surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto, in any way impaired or suspended.

Cal. Civ. Code § 2819.

17. We assume for the purposes of discussion that the technical distinction between guarantors and sureties does not affect this case.

explained at page 15 *supra*, former 11 U.S.C. § 34 provided that a bankruptcy proceeding would not affect the liability of a guarantor. Second, by the terms of the guaranty, Kurtz granted to Guardian, and to the SBA as Guardian's assignee, "full power, in its uncontrolled discretion and without notice . . . to deal in any manner with the liabilities and the collateral." We think this clause incontrovertibly includes the modifications of the original debt that were made pursuant to the Plan and in the subsequent liquidation. The California courts have enforced such contractual waivers notwithstanding Section 2819. *See, e.g., Brunswick Corp. v. Hays*, 16 Cal.App.3d 134, 93 Cal.Rptr. 635 (Ct.App. 1971); *Wiener v. Van Winkle*, 273 Cal.App.2d 774, 78 Cal.Rptr. 761 (Ct.App. 1969).

The defendant next contends that under California law that Plan constitutes an accord and satisfaction of Arnold's debt to the SBA. To the extent that this defense relies on Section 3606 of the California U.C.C. and Section 2819 of the California Civil Code, we reject it for the reasons set out in the preceding paragraph. These provisions simply do not provide defenses in this case. Neither are we persuaded by the California cases to which defendant directs our attention in support of his claim that his guaranty obligation has been discharged. *Durgin v. Kaplan*, 68 C.2d 81, 65 Cal.Rptr. 158 (1968), and *Zellner v. Lasky*, 13 Cal.App.3rd 787, 91 Cal.Rptr. 810 (Ct.App. 1970), each involved a corporate reorganization in which a creditor accepted equity securities in full satisfaction of the obligation to him. When the securities subsequently declined in value, the creditors sought to recover the balance of the original debt from the guarantors. The *Durgin* and *Zellner* courts held that these actions were barred, reasoning that a creditor who chooses securities in lieu of cash voluntarily gambles that the debtor corporation will recover and that the securities will appreciate in value. The California courts

declined to make guarantors insurers of the creditor's gamble.

These cases are inapposite to the facts before us. The SBA did not voluntarily choose to take either cash or securities in satisfaction of Arnold's debt, but retained its security interest in Arnold's assets. Indeed, defendant has adduced no evidence that the SBA accepted any securities during the Chapter XI proceedings. Defendant originally so alleged, but now concedes that the stock was transferred through an escrow agent to the four individuals who became shareholders in the reorganized debtor. Plainly, the Plan did not contemplate that Arnold's obligation to the Government would be extinguished, but merely transferred from the original to the reorganized debtor.

Defendant alleges that the four new owners were handpicked by the SBA, which thereby obtained a benefit. No eveidence was offered to that effect, but even if this contention is accurate, we fail to see its relevance. One purpose of reorganization proceedings, like other proceedings in bankruptcy, is the protection to the extent possible of creditors' interests. Moreover, the bankruptcy court in which the Plan was filed had exclusive jurisdiction over the debtor and his property, and exclusive authority to confirm arrangements. 11 U.S.C. §§ 761-772. For the foregoing reasons, we reject defendant's accord and satisfaction defense.

C. SBA's Obligation to Kurtz Under the Guaranty Agreement: The "Commercial Reasonableness" Argument

Finally, defendant asserts that the Government cannot collect from him on the guaranty because the SBA failed to notify him prior to its sale of the collateral and failed to dispose of the collateral in "a commercially reasonable manner," as required by Section 9504(3) of the California U.C.C. The Government replies, first, that state law is inapplicable here, and second, that defen-

dant's guaranty is "unconditional" so that he cannot raise these defenses even if otherwise they would be available.

Choosing the rule of law that governs defendant's rights as guarantor would be more difficult than was finding the applicable statute of limitations, for no federal statute supplies the substantive rule, *see* page 11 *supra*, but we conclude that it is unnecessary for us to do so. We assume, without deciding, that the principles announced in *Kimbell Foods* would require that California law be adopted as the federal rule of decision.[18] We find, however, that defendant's claims based on the Government's disposition of the collateral are insufficient as a matter of law.

The California Uniform Commercial Code provides:

> A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and

18. Since the Supreme Court decided *Kimbell Foods*, 440 U.S. 715 (1979), a number of federal courts have considered whether the federal rule for construing SBA guaranty agreements incorporates "nondiscriminatory state laws," *id.* at 740, or some other federal common law rule. The majority have concluded that, at least where the pertinent statute is the U.C.C. as adopted by a particular state, the federal rule incorporates state law. *See*, e.g., United States v. Public Auction Yard, 637 F.2d 613, 615 (9th Cir. 1980); In Re Murdock Mach. & Eng'ring Co., 620 F.2d 767, 772-73 (10th Cir. 1980); United States v. Irby, 618 F.2d 352, 355 (5th Cir. 1980); *cf.* United States v. Willis, 593 F.2d 247, 252-54 (6th Cir. 1979) (same result in case decided prior to *Kimbell Foods*).

The Government argues that we should fashion a uniform federal rule for interpreting SBA standard form guaranty agreements. A uniform rule is desirable, according to the Government, because identical agreements are used throughtout the United States; economical and efficient administration is a central objective of the SBA, which operates at a higher risk than other lenders; and application of a federal rule here would disrupt no comemrcial relationships based on state law, for no third parties are involved. Though these arguments are appealing, they apparently were rejected by the Supreme Court in *Kimbell Foods*. *See* 440 U.S. at 733, 736-37 (because loan applications are individually evaluated, agency easily can adjust transaction to reflect special risk and state law).

> place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor . . . and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice . . . , a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is made.

Cal. U. Com. Code § 9504(3). This provision is the heart of Kurtz's defense, for he maintains that he was not notified of the sale of Arnold's assets, and that the sale was not conducted in a commercially reasonable manner. The California courts have not determined whether a secured creditor owes any duty to a guarantor under this statute, which speaks only of the secured party, the debtor, and other persons having a security interest in the collateral. However, there is considerable authority in other jurisdictions for extending to guarantors the protections afforded debtors by Section 9-507 of the U.C.C. *See, e.g., United States v. Willis*, 593 F.2d 247, 255 (6th Cir. 1979); *First Nat'l Park Bank v. Johnson*, 553 F.2d 599, 601 (9th Cir. 1977); *Fedders Corp. v. Taylor*, 473 F.Supp. 961, 976 n.11 (D.Minn. 1979) (citing cases). In other settings, California courts have extended debtors' statutory rights to guarantors. *See Credit Managers Ass'n v. Superior Ct.*, 51 Cal. App. 3d 352, 124 Cal. Rptr. 242 (Ct. App. 1975); *Union Bank v. Brummel*, 269 Cal.App.2d 836, 75 Cal. Rptr. 234 (Ct.App. 1969). Additionally, we think that measurable reliance by a guarantor on the existence of collateral as an inducement to execute the guaranty, in combination with a guarantor's rights, may bring the guarantor within the class of persons that has an interest secured by the col-

lateral. We conclude that guarantors may raise defenses based on Section 9504(3) in collection actions like this one.

The next question to be addressed is whether a guarantor may waive by contract the protections afforded by the statute. Section 9501 plainly bars such a wavier by the debtor,[19] Cal. U. Com. Code § 9501(3) (b), but some courts interpreting Section 9-501 of the U.C.C. have concluded that section constrains only the debtor and the secured creditor. *See First Nat'l Park Bank v. Johnson*, 553 F.2d at 602 (neither language nor policy of Article 9 requires proscription of waiver by guarantor). Other courts have reached the opposite conclusion. *See United States v. Chatlin's Dep't Store, Inc.*, 506 F.Supp. 108, 112 (E.D.Pa. 1980); *cf. State Bank v. All-American Sub, Inc.*, 289 N. W. 2d 772, 779 (N.D. 1980) (citing cases).

A series of cases, involving actions by the United States to recover on SBA loan guarantees and construing language like that found in the contract executed by defendant, allows such contractual waivers. These cases preclude defenses based on actions by the secured creditor that are detrimental to the guarantor's interests by finding that the guaranty is "unconditional." The theory underlying these cases is that when a guarantor consents to release, substitution, or modification of the collateral by the secured creditor, it cannot fairly be said that the guarantor has relied on the collateral as an inducement to sign the guaranty. Therefore, he has agreed to be absolutely liable. *See United States v. Southern Cycle Accessories, Inc.*, 567 F.2d 296 (5th Cir. 1978); *First Nat'l Park Bank v. Johnson; United States*

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19. Section 9501 assures the debtor of (1) notice and (2) a commercially reasonable sale or disposition of the collateral. Kurtz has raised defenses based on both assurances, but has not pressed his claim of lack of notice. Therefore we will be primarily concerned with his ability to defend on the ground that the Government's sale of Arnold's assets was not commercially reasonable.

v. Bertie, 529 F.2d 506 (9th Cir. 1976); *United States v. Newton Livestock Auction Market, Inc.*, 336 F.2d 673 (10th Cir. 1964); *cf. Fireman's Fund Ins. Co. v. Joseph Biafore, Inc.*, 526 F.2d 170 (3rd Cir. 1975) (construing private guaranty agreement); *Bank of New Jersey v. Heine*, 464 F.2d 1161 (3rd Cir. 1972) (construing private guaranty agreement). A review of these cases will be instructive.

Newton Livestock involved a $120,000 SBA loan to Newton, which was secured by a mortgage and three guaranty agreements. After the debtor's default, the SBA foreclosed. When notified that the insurance on the mortgaged premises had lapsed, the SBA elected to be a self-insurer. The property subsequently suffered $30,000 in storm damage; the guarantors contended that they had been either fully or partially relased from their obligations because the Government's failure to renew the insurance policy materially increased their risk. Rejecting this defense, the court stated:

> Their reliance on "equities" and general principles of law are unpersuavise because their rights and liabilities are fixed by the contracts of guaranty. The risk of the guarantors was not increased because their obligations were absolute and unconditional. By the terms of the guaranty contracts SBA could have made an entire release of the seucrity for the loan and still have recovered from the guarantors. Lack of notice of mortgagor's default in its obligation to insure is unimportant because the guarantors expressly waived notice of any default by the mortgagor. The guarantors have failed to show the breach of any duty to them. They have no right to a credit because of the storm damage.

336 F.2d at 677.

United States v. Bertie was also an action against the guarantors of an SBA loan, brought to recover the bal-

ance remaining on a $250,000.00 note after the auction sale of the collateral was conducted by a trustee in bankruptcy. At that sale, the Government itself had purchased the corporate assets in which it had a security interest. The guarantors contended that the SBA bid less than a "commercially reasonable" amount and that consequently they were released. However, the court concluded that the Government owed no duty to the guarantors in this respect, noting that "the agreement permitted the SBA to release the collateral entirely without consent of the guarantors." 529 F.2d at 507.

Similarly, in *Southern Cycle Accessories*, the Court rejected the claim of one guarantor of an SBA loan that the release of two co-guarantors should reduce her liability. To determine her rights, the court looked to the terms of the standard SBA guaranty agreement, virtually identical to that executed by defendant, which specified that the release of other guarantors would not affect a co-guarantor's liability; implied a waiver of the right to contribution; waived any right to require the creditor to bring suit against the other guarantors; and made the guarantors jointly and severally liable. By the terms of the agreement, said the court, her liability was absolute and unconditional. 567 F.2d at 298. *See also First Nat'l Park Bank v. Johnson*, 553 F.2d at 602 ("where a guaranty is unconditional, a creditor, at least absent willful or grossly negligent waste or misconduct, may recover a deficiency judgment from an unconditional guarantor without regard to the creditor's treatment of the collateral.")

The tendency of the courts to permit SBA loan guarantors to waive the protections afforded by Section 9-504(3) of the U.C.C. is complemented by the willingness of the California courts to allow guarantors to waive Civil Code protection of their security interests[20] *See*,

20. We have found no California cases that discuss the ability of a guarantor to waive the protections afforded by the Uniform Commercial Code.

e.g., Brunswick Corp. v. Hays; Weiner v. Van Winkle. We find the reasoning of these cases persuasive and conclude that defendant could waive protections that the law would otherwise afford him.

Reviewing in light of these principles the terms of the guaranty executed by defendant we find that defendant has made no allegations that, if proven, would bar the Government's recovery. As we described the agreement at pages 5 and 6 *supra*, the creditor is given considerable power over Arnold's mortgaged assets.[21] This power is exercisable at the creditor's sole discretion and without notice, and includes authority wholly to release the collateral without substitution. The only contractual limitation on this power is the provisions of the agreement between the principal debtor and the creditor. By the terms of the note, however, "the undersigned [Arnold's, by defendant] and sureties authorize the Holder [Guardian] to sell, at public or private sale, any or all collateral deposited and property pledged to secure the payment of this Note" upon default by the debtor. The note provides further that any release or indulgence by the Holder and its assigns with respect to one party or the collateral, with or without notice to other parties to the transaction, will not impair its rights with respect to any other party.

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21. The creditor's broad powers derive not only from the contractual provision that the guarantor "hereby unconditionally guarantees . . . due and punctual payment when due," but also from the series of clauses that specify the creditor's rights with particularity. For this reason, we decline to follow the courts that have described the SBA loan guarantor's obligation in terms of the technical meaning of "unconditional guaranty" in suretyship law, concluding that the term signifies only that the creditor has no duty "to proceed against the principal obligor before attempting to collect from the guarantor." United States v. Willis, 593 F.2d 247, 254 (6th Cir. 1979); *see* United States v. Chatlin's Dep't Store, Inc., 506 F.Supp. 108 111-12 (E.D.Pa. 1980). Consequently, in these cases the defendant guarantors were permitted to raise the defense of commercial reasonableness. With all due respect, we think that the language of the entire agreement must be read to bar this defense.

The guarantor does have rights "by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral . . . caused by the willful act or willful failure to act of Bank." But there are no allegations of such willful behavior here. We hold that Kurtz cannot raise the alleged commercial unreasonableness of the sale of Arnold's assets to defend this action.

Before concluding, we will explain why we think that even if the SBA had some obligation to preserve the collateral, defendant has not created a genuine issue of material fact with respect to the commercial reasonableness of the SBA's disposition of Arnold's assets.[22]

Defendant's argument about the disposition of the collateral includes both the bankruptcy reorganization and the later liquidation of Arnold's assets. Defendant complains that the Allstate Uniform "routes" were undervalued in the Plan of Arrangement. Under the Plan, $100.00 was allocated to the goodwill of Allstate Uniforms, including the routes, but defendant states, in his recently filed affidavit, that the routes were worth a minimum of $250,000.00.[23] For several reasons, however, this asserted disparity in value and price does not create a triable issue. There is no indication that these

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22. The burden of proving commercial reasonableness rests on the secured party, the Government, under California law. *See* American Business Credit Corp. v. Kirby, 122 Cal.App.3d 217, 175 Cal.Rptr. 720 (Ct.App. 1981); Clark Equipment Co. v. Mastelotto, Inc., 87 Cal.App.3d 88, 150 Cal.Rptr. 797 (Ct.App. 1978). The courts deciding the allocation of burdens of proof under U.C.C. §9-504 have reached conflicting results. *See* United States v. Willis, 593 F.2d 247, 258 (6th Cir. 1979) (citing cases); 4 R. Anderson, Anderson on the Uniform Commercial Code §9-504, at 237 (Supp. 1980). However, the California rule represents the majority position, and we continue to assume, without deciding, that state law supplies the federal rule of decision.

23. We note that two types of routes are listed by defendant in his affidavit: Arnold's dry cleaning routes, which existed prior to the original loan transaction, and Allstate's routes. However, the value of the first is plainly irrelevant, because they were not made collateral for the loan.

routes were ever made collateral by the after-acquired property clause of the loan agreement, which reaches only property that would have been included initially if it had existed at the time the loan was made. The SBA loan authorization required the inclusion only of machinery, equipment, fixtures, and furniture. Moreover, if the Allstate routes were made part of the collateral, their disposition was approved by the bankruptcy court. Section 9507(2) of the California U.C.C. provides that "[a] disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable."

Additionally, merely alleging a discrepancy between the value obtained and the true value of the collateral is not sufficient to raise the question of commercial reasonableness. Section 9507(2) states that "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." *See also Sierra Financial Corp. v. Brooks-Farrer Co.*, 15 Cal.App.3d 698, 93 Cal.Rptr. 422 (Ct.App. 1971).

Defendant also argues that the sale of the collateral, at a public auction in November 1972, was not reasonable, but he does not directly challenge the method, manner, time, place, or any other aspect of the sale. Nor does defendant make any allegations of willful misconduct by the SBA. Instead, he relies on the type of inference from price discrepancy alone that is discouraged by Section 9507(2). Defendant cites *Mercantile Financial Corp. v. Miller*, 292 F.Supp 797 (E.D.Pa. 1968), in support of the proposition that a large discrepancy between price and value raises a factual issue about whether a disposition is commercially reasonable. That case does not so hold, concluding only that a substantial discrepancy "is relevant" to such a determination. *Id.* at

801. Moreover, *Mercantile Financial Corp.* involved challenges to other elements of the disposition in addition to the price obtained, and thus differs significantly from this case.

Finally, we note that the Government's evidence that the auction sale of the collateral was sound is compelling. Indeed, apart from defendant's unsupported affidavit, none of the available estimates of the value of Arnold's assets names a figure larger than $30,000.00.[24] Uncontroverted evidence establishes that the auction was publicized through newspaper advertising and brochures, and was conducted by professional auctioneers. The Government also provided an accounting of the auction proceeds of $12,103.20, of which $7,867.88 was credited to the loan balance. These facts meet the standards of commercial reasonableness under California law. *See Personal Jet, Inc. v. Callihan*, 624 F.2d 562, 568-69 (9th Cir. 1980) (applying California law); *General Elec. Corp. v. Bo-Mar Constr. Co.*, 72 Cal.App.3d 887, 140 Cal.Rptr. 417 (1977).

V. Conclusion

Because defendant has failed to create a genuine issue of material fact with respect to any of his defenses nad because, in the absence of a defense, the United States must prevail on the concededly unsatisfied guaranty, judgment must be granted for the United States. An affidavit recently filed by the Government fixes the sum due as of June 23, 1981, at $610,729.70, with inter-

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24. In a March 1972 letter to the SBA, Leonard W. Block, vice-president of the reorganized Arnold's, estimated that the total value of inventory, vehicles, and office equipment was $30,000.00. Arnold's was then a going concern. After Arnold's ceased doing business, the Los Angeles firm of Ostrin & Ostrin, professional auctioneers, estimated that the total value of Arnold's assets was $12,000.00 to $13,000.00.

est accruing at the rate of $62.23 per day. Therefore, judgment will be entered in the sum of $618,695.14.[25] An appropriate order follows.

EDWARD R. BECKER, J.

25. We have calculated the additional interest to date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA on behalf of its Agency, THE SMALL BUSINESS ADMINISTRATION	:	CIVIL ACTION
v.	:	
MORRIS I. KURTZ	:	NO. 76-313

ORDER

AND NOW, this 29th day of October 1981, upon consideration of the parties' motions for summary judgment, it is hereby ORDERED that plaintiff's motion is GRANTED and defendant's motion is DENIED. It is further ORDERED that judgment shall be entered for plaintiff in the amount of $618,695.14.

By the Court:

EDWARD R. BECKER, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
on behalf of its Agency, THE	:	CIVIL
SMALL BUSINESS ADMINISTRATION	:	ACTION
v.	:	
	:	
MORRIS I. KURTZ	:	No. 76-313

ORDER

AND NOW, this 17th day of May, 1979, upon consideration of all the moving and answering papers, IT IS ORDERED that the plaintiff's motion for summary judgment is DENIED.

By the Court:

EDWARD R. BECKER, J.

REJC: RS Forster, Jr.:
yymc
File 75-0615

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA on behalf of its Agency, THE SMALL BUSINESS ADMINISTRATION Plaintiff	: : :	CIVIL ACTION
v.	:	
MORRIS I. KURTZ 8211 Brookside Avenue Elkins Park, Pa. 19117	:	No. 76-313

COMPLAINT

The United States of America, on behalf of its Agency, The Small Business Administration (hereinafter referred to as S.B.A.) brings this action against defendant above-named and alleges:

COUNT I

1. That this action is within the jurisdiction of this Court, pursuant to the United States Code, Title 28, Section 1345, and venue is properly set in this Court, because defendants reside in this District.

2. That the Defendant MORRIS I. KURTZ resides at 8211 Brookside Avenue, Elkins Park, Pa. 19117.

3. That on the eleventh day of April 1969, a loan in the amount of $400,000.00, at an interest rate of 8% per annum, was made to ARNOLD'S CLEANERS, INC., a corporation formed pursuant to the laws of the State of California, by The Guardian Life Insurance Company. Said loan was evidenced by a Promissory Note, a copy of which is attached hereto and made a part hereof as

Exhibit "A", whereby ARNOLD'S CLEANERS, INC. agreed to pay pursuant to the terms of said Promissory Note, as follows:

> Four Thousand Nine Hundred Thirty-five Dollars ($4,935.00) including principal and interest, payable monthly beginning four (4) months from the date of the note, with the balance of principal and interest and all other indebtedness payable in full on or before eight (8) years from the date of the note; with the provision that each said installment shall be applied first to interest accrued to the date of receipt of such installment, and the balance if any, to principal.

4. That Plaintiff, SBA, pursuant to a certain Blanket Guaranty Contract and Authorization (copies of which are attached hereto and made a part hereof as Exhibits "B" and "C") did guarantee 90% of the Guardian Life Insurance Company's exposure in said loan.

5. That defendant, MORRIS I. KURTZ, did as President and sole stockholder of said ARNOLD'S CLEANERS, INC. execute and enter into an unconditional Guaranty Agreement, with the Guardian Life Insurance Company, original obligee under the aforesaid Note by the terms of which defendant, MORRIS I. KURTZ, became liable for the entire indebtedness due and owing Guardian Life Insurance Co. (A copy of said Guaranty Agreement is attached hereto as Exhibit "D" and made a part hereof.)

6. That pursuant to terms of the Blanket Guaranty Contract and Authorization as aforementioned, the SBA did, upon request from the Guardian Life Insurance Co., honor its guarantee and purchase its guarantee portion of said loan and in consideration therefore was assigned the above referenced Note and Guaranty.

7. That demand was made upon the said MORRIS I. KURTZ, for payment in full of the balance due and owing SBA as assignee/guarantor of said indebtedness,

on the 8th day of May 1975, and that defendant has failed and refused to remit the amount so demanded.

8. That defendant, MORRIS I. KURTZ, has committed default in that he has failed to meet the repayment obligations set forth in said Promissory Note and the Guaranty Agreement:

9. That as a result of the aforesaid default of MORRIS I. KURTZ and subsequent Demand and Acceleration in accordance with the terms of the aforesaid Promissory Note and Guaranty Agreement the defendant herein is liable to the SBA immediately for the entire amount of the balance due on the aforesaid loan.

10. That nothing contained in this Complaint or any subsequent actions thereon shall be construed as a waiver by the United States of America or its Agency the SBA, of any rights accruing under any security pledged by the defendant herein to secure said Guaranty to wit, a one-third (⅓) stock interest in Cornell Uniforms, Inc. and All State Uniforms, Inc. both of Glenside, Pa.

11. That there is now due by the defendant on his obligation to SBA the following:

a. Total amount disbursed	$400,000.00
b. Less repayment	20,873.68
c. Current balance	379,126.32
d. Add accrued interest	94,617.49
e. Total Charges outstanding	$473,743.81

Interest will accrue on this obligation from the Seventh day of April, at a daily rate of 61.2131, until judgment and at a legal rate thereafter on the judgment.

WHEREFORE, Plaintiff request judgment against defendant in the total sum of $473,743.81 plus interest thereon at a daily rate of 61.2131 from the Seventh day

of April 1975, plus Attorney's fee of 5% and all other appropriate costs and fees.

/s/ Robert E. J. Curran

ROBERT E. J. CURRAN
United States Attorney

/s/ Robert S. Forster, Jr.

ROBERT S. FORSTER, JR.
Assistant United States Attorney

EXHIBIT "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, on behalf of its Agency, THE SMALL BUSINESS ADMINISTRATION	:	CIVIL ACTION
v.	:	
MORRIS I. KURTZ	:	No. 76-313

AMENDED ANSWER

Count I.

1. Denied.
2. Admitted.
3, 4 and 5. Plaintiff is pleading the contents of a written document, the provisions of which shall speak for themselves at the trial of the cause hereof, if material.
6. Defendant, after reasonable investigation, is without sufficient information to enable him to respond properly to the averments of Paragraph 6 and demands proof of same at the trial of the cause hereof, if material.
7. Demand admitted; obligation denied.
8 and 9. Denied.
10. Denied. In addition, defendant repeats the averments contained in answers to paragraphs 3, 4 and 5 above.
11. Denied.

WHEREFORE, defendant demands dismissal of the Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's action is barred by the provisions of the Statute of Frauds.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred by the Statute of Limitations.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred by laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred by estoppel.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred by the provision of the Bankruptcy Act, as amended.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred by the provision of the Uniform Commercial Code.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred because neither the Plaintiff nor its assignor mitigated the damages.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's action is barred because neither the plaintiff nor its assignor objected to the proceedings in the bankruptcy action involving Arnold's Cleaners, Inc.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's cause of action is barred because plaintiff and its assignor acquiesced in the dissipation of the assets which were the security for the loan.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's action is barred because venue does not properly rest in this District.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state a valid cause of action.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff is not the real party in interest.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff is claiming an amount in excess of that which its exhibits indicate.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff and its assignor conspired with others, and did, with others, engage in acts which defrauded the Estate of Arnold's Cleaners, Inc. in the proceedings under the Bankruptcy Act.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff and its assignor conspired with others, and did, with others, engage in acts which defrauded defendant.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff and/or its assignor did not make proper demand upon Arnold's Cleaners, Inc. for payment of the sum or sums allegedly due it or them.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff and its assignor are barred from bringing this action against Defendant because Plaintiff's choice in acceptance of the Chapter 11 arrangement constituted full accord and satisfaction of any debt for which Defendant would guaranty.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff and its assignor are barred from bringing this action against Defendant because Plaintiff's choice to accept the Chapter 11 arrangement constituted a new contract between Plaintiff and the assignee of ownership

and control of Arnold's Cleaners, thereby releasing Defendant of any obligation as guarantor.

COUNTERCLAIM

1. Defendant alleges that Arnold's Cleaners, Inc. filed a Petition, in 1971, under Chapter XI of the Bankruptcy Act, as amended.

2. During the proceedings under the aforesaid Chapter XI matter, plaintiff, and/or its assignor, had ample opportunity to protect the security for the loan which is the basis for the action.

3. During the said proceedings, plaintiff, and/or its assignor, did not exercise due diligence in the protection of the assets of Arnold's Cleaners, Inc.

4. Plaintiff, and/or its assignor, were negligent and/or careless in that they did not properly look after the assets of Arnold's Cleaners, Inc. in the Chapter XI proceedings.

5. During the aforesaid Chapter XI proceedings, the assignor of plaintiff acted in a manner which was contrary to the best interests of Arnold's Cleaners, Inc. the assets of which are the security for the loan which is the basis for this suit.

6. Solely as a result of the acts of omissions of the plaintiff and/or its assignor, as aforesaid, defendant has suffered a loss in the sum of $400,000, plus the expenses of this action.

7. The aforesaid actions and/or omissions of the plaintiff and/or its assignor were gross negligence.

8. The aforesaid acts and/or omissions of plaintiff and/or its assignor were willful and intended to deprive Arnold's Cleaners, Inc. and defendant of their property and subject defendant to this action.

WHEREFORE, defendant claims against plaintiff the sum of FOUR HUNDRED THOUSAND DOLLARS

($400,000), plus costs and punitive damages, together with reasonable counsel fees.

WILBUR GREENBERG
Attorney for Defendant

Of Counsel:

SIDKOFF, PINCUS & GREENBERG
1315 Walnut Street, Suite 700
Philadelphia, Pennsylvania 19107
(215) KI6-0600

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA on behalf of its Agency, SMALL BUSINESS ADMINISTRATION	:	CIVIL ACTION
v.	:	
MORRIS I. KURTZ	:	No. 76-313

ANSWERS OF PLAINTIFF TO DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now the United States of America on behalf of its Agency, the Small Business Administration, by its Attorney, David W. Marston, United States Attorney for the Eastern District of Pennsylvania, and Robert S. Forster, Jr., Assistant United States Attorney for the Eastern District of Pennsylvania and answers the Interrogatories filed by the Plaintiff as follows:

I.1 Who, for the SBA, handled the matter of the authorization (Ex. "C" to Complaint) to the insurance company?

Answer: Those persons involved in formulating the authorization were, George P. Delia, Loan Officer, Robert V. Fisher, Supervisory Loan Officer, Edward L. Jensen, Chief, Financial Assistance Division and Alvin P. Meyers, Regional Director. All of the aforementioned were at the time of the making of the loan located at the Los Angeles office of the Small Business Administration, 849 S. Broadway, Los Angeles, Calif. 90014.

I.2 Who had knowledge of background leading to and on the matter of the said authorization to the insurance company?

Answer: See answer to Interrogatory I.1.

I.3 How much of the loan to Arnold's Cleaners was guaranteed by the SBA?

Answer: 87.5%

I.4 Who was or were, the party or parties, or organization or organizations, which was or were guaranteed by the SBA?

Answer: The Guardian Life Insurance Company of America, 201 Park Avenue, South, New York City, New York, 10003.

D.1 Produce all documents which refer to the guarantee or guarantees supplied in answer to Interrogatory I.4.

Answer: See Exhibit A attached

I.5 How much was lent by the Guardian Insurance Company and/or the Imperial Bank to the borrower?

Answer: $400,000 was disbursed by the Guardian Life Insurance Company of America on April 11, 1969.

1.6 How much, or were, the loan or loans formalized and/or memorialized?

Answer: the loan to Arnold's Cleaners, Inc. was evidence by:

a. A note in the amount of $400,000
b. Loan Agreement
c. Security Agreement
d. Assignment of life insurance on the life of Morris I. Kurtz
e. Guaranty of Morris I. Kurtz

D.2 Supply copies of all such documents referred to in answer to Interrogatory I.6

Answer: See Exhibit B

I.7 How much was repaid by the borrower to the said insurance company and/or bank?

Answer: Twenty Thousand Eight Hundred Seventy-three Dollars and Sixty-nine cents ($20,873.69)

I.8 Did the SBA pay the insurance company and/or the bank?

Answer: Upon SBA's honoring the guaranty, the check therefore was made payable to the Guardian Life Insurance Company of America, 201 Park Avenue, South New York City, New York, 10003.

I.9 If the answer to Interrogatory I.8 is "yes", State:

a. When? Answer: 2/11/71

b. How much? Answer: $342,867.10

I. Principal? Answer: $331,735.52

II. Interest? Answer: $11,131.58

I.10 Did Arnold's Cleaners default under the terms of the entire agreement?

Answer: Yes

I.11 If the answer to Interrogatory I.10 is "yes", when and how?

Answer: On or about December 14, 1970 Arnold's Cleaners, Inc. filed a Plan of Arrangement under Chapter XI of the Bankruptcy Act, which Act constituted a default under the terms and conditions of the loan.

I.12 When was the SBA notified of Arnold's Cleaners filing of the petitioner under Chapter XI?

Answer: The SBA lacks knowledge or information sufficient to answer this interrogatory

I.13 What action or actions did the SBA take in the Chapter XI proceedings?

Answer: The United States filed a Proof of Claim on behalf of its agency the Small Business Administration.

I.14 Set forth, chronologically, all meetings, conversations, discussions and/or any other reference by any employee of SBA in or to Arnold's Cleaners.

Answer: The Interrogatory formulated is overly generalized and broad and the Plaintiff is unable to identify the information requested. The Plaintiff will respond to the interrogatory upon a more particular statement as to the information requested.

I.15 Set forth, chronologically, all meetings, conversations, discussions and/or any other reference by any employee of SBA in or to Allstate Uniforms.

Answer: The interrogatory formulated is overly generalized and broad and the Plaintiff is unable to identify the information requested. The Plaintiff will respond to the interrogatory upon a more particular statement as to the information requested.

I.16 Set forth, chronologically, all meetings, conversations, discussions and/or any other reference by any employee of SBA in or to defendant

Answer: The interrogatory formulated is overly generalized and broad and the Plaintiff is unable to identify the information requested. The Plaintiff will respond to the interrogatory upon a more particular statement as to the information requested.

I.17 Identify any documents pertaining to or referring to:

(a) Arnold's Cleaners
(b) Allstate Uniforms
(c) Defendant

Answer: The interrogatory formulated is overly generalized and broad and the Plaintiff is unable to identify the information requested. The Plaintiff will respond to the interrogatory upon a more particular statement as to the information requested.

D.3 Attach a copy of all those set forth in the answer to interrogatory I.17(a), (b) and (c).

Answer: Plaintiff cannot produce the documents requested until such time as Interrogatory 17 has been sufficienty particularized so as to enable identification of the documents requested. Upon so doing, Plaintiff stands ready to supply Defendant with the documents requested or to arrange for a time for Defendant to inspect the records of plaintiff regarding the subject matter.

I.18 Did the SBA file a Proof of Claim under the proceedings under Chapter XI?

Answer: Yes.

D.4 If the answer to Interrogatory I.18 is "yes", attach a copy of same to your answer.

Answer: The United States provided the defendant a copy of the requested Proof of Claim on June 16, 1976.

I.19 How much, if any, was paid as a result of the Proof of Claim referred to above?

Answer: The United States, to the best of its knowledge, information and belief asserts that $1,750 was repaid pursuant to the Plan of Arrangement.

I.20 If it was not paid in full, why not?

Answer: The Plan of Arrangement filed by Arnold's Cleaners, Inc. proved unsuccessful and, therefore, the retirement of the debt due and owing Plaintiff as provided by the terms of the Plan of Arrangement was never realized.

I.21 What disposition was made of the collateral pledged by Arnold's Cleaners and/or Allstate Uniforms pursuant to the loan which is the basis of the law suit?

Answer: All personalty collateral pledged by Arnold's Cleaners, Inc. was exposed for public auction sale pursuant to the Uniform Commercial Code, as adopted in the State of California, after peaceful possession of same had been obtained by Small Business Administration. Said public auction sale was held by Ostrin and Ostrin Company, auctioneers, 738 E. 12th St., Los Angeles, Calif., 90021.

I.22 Give the dates and amounts of money paid since the inception of the Chapter XI proceedings.

Answer: (1) $250 effective credit date 12/14/71
(2) $250 effective credit date 1/28/72
(3) $250 effective credit date 2/25/72
(4) $500 effective credit date 3/15/72
(5) $500 effective credit date 4/10/72
(6) $7,867.88 effective credit date 11/28/72

I.23 Idenify all persons and supply last known home addresses and places of employment of those who have any knowledge whatsoever of the:

(a) Negotiations for the loan;
(b) Discussions regarding the default;
(c) Discussions regarding the loan;
(d) Discussions regarding collections;
(e) Discussions regarding disposition of the collateral.

Answer: The Interrogatory formulated, and each and every part thereof, is overly generalized and broad and the plaintiff is unable to identify the information requested. The plaintiff will respond to the Interrogatory upon a more particular statement as to the information requested.

I.24 Identify any and all documents, paraphernalia and any and all other things relevant to the issues in the case.

Answer: The interrogatory formulated, and each and every part thereof, is overly generalized and broad and the plaintiff is unable to identify the information requested. The plaintiff will respond to the interrogatory upon a more particular statement as to the information requested.

D.5 Attach to your answers copies of all those mentioned in Interrogatory I.24.

Answer: Plaintiff cannot produce the documents requested until such time as Interrogatory 17 has been sufficiently particularized so as to enable identification of the documents requested. Upon so doing, Plaintiff stands ready to supply Defendant with the documents requested or to arrange for a time for Defendant to inspect the records of plaintiff regarding the subject matter.

DAVID W. MARSTON
United States Attorney

ROBERT S. FORSTER, JR.
Assistant U.S. Attorney

SMALL BUSINESS ADMINISTRATION
AUTHORIZATION
INSURANCE COMPANY'S
AUTHORIZATION APPROVING REQUEST
FOR SBA GUARANTY

THE GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA
201 Park Avenue South
New York, New York 10003

SBA Loan No. L-769, 410-00-01-LA

Your request on SBA Form 4 Part I dated November 20, 1968 for SBA to guarantee 87½% of a Loan in the amount of $400,000.00, to be made by Insurance Company to

ARNOLD'S CLEANERS, INC.
11054 Pico Boulevard
Los Angeles, Calif. 90025

and guaranteed by SBA to the extent provided in the Guaranty Agreement between Insurance Company, (herein referred to as Bank,) and SBA, is hereby approved pursuant to section 7(a) of the Small Business Act, as amended, subject to:

(a) Provisions of the Guaranty Agreement herein referred to, and

(b) First disbursement of the loan being made not later than six months, and no disbursement being made later than twelve months, from the date of this Authorization, unless such time is extended pursuant to prior written consent by SBA, and Insurance Company.

(c) Provisions set forth on reverse side hereof.

The following forms are herewith enclosed:

(1) Three partially completed copies, executed by SBA, of Guaranty Agreement (SBA Form 597). At the time of execution of note and loan agreement by borrower, and prior to first disbursement on account of the

loan, Bank shall complete the details of the Guaranty Agreement execute and date the same and forward two copies to the appropriate SBA office.

(2) Three copies of SBA Form 530, "Note", one to be executed by the Borrower, the other two to be conformed. The original executed copy is to be retained by you, one conformed copy to be sent to SBA, and the other copy may be delivered to the Borrower.

(3) A supply of SBA forms for your use in reporting transactions (including the initial disbursement) in connection with the loan.

(4) A supply of SBA Forms 159 and 740. One copy of each should be returned to this office.

(5) In addition to the above, following disbursement, please send SBA one copy of each document executed in connection with this loan, including copies of real estate policies and chattel searches, and a copy of your counsel's opinion.

Administrator,
HOWARD J. SAMUELS

Alvin P. Meyers
Regional Director

February 6, 1969

PROVISIONS

1. Completion of loan on basis of, and subject to requirements, or conditions set forth in SBA Form 4 Part I and other provisions of Bank's Request, including supporting documents thereto. Bank or holder of Note (hereinafter referred to as "Bank") may, from time to time, impose any other conditions which it may consider desirable, and which are not inconsistent therewith nor with this Authorization nor with the Guaranty Agreement (SBA Form 597), provided that such conditions do not establish any preference in favor of Bank.

2. The Bank may, without the prior writen consent of SBA, (A) extend any of the scheduled payments thereon for a period not exceeding three months, or (B) release from the collateral securing the loan real or personal property upon the substitution of other collateral of like character and of equal or greater value, or (C) release from the collateral securing the loan real or personal property for cash sale at fair market values prevailing at the time of sale, provided (a) thc proceeds of such sale are applied on the loan in inverse order of maturity and (b) the remaining collateral adequately secures the loan.

3. (a) Repayment Terms, Interest Rate(s), and Maturity. Interest at eight percent (8%) per annum, including principal and interest each in the amount of $4,935.00, payable monthly beginning four months from date of Note and balance of principal and interest payable eight years from date of Note, with further provision that each said monthly installment shall be applied first to interest accrued to date of receipt of said installment and the balance if any to principal, except that the first installment payment shall be an equal amount to all interest accrued to that date plus regular payment of $4,935.00. 327 No. # 1

(b) Use of proceeds of loan as follows: (show specific uses for which loan is authorized).

(1) Approximately $173,410 for debt payment:

Raymond Conley—	$ 9,057
Ahmunson Bank—	15,627
Nathan & George Ostrin—	89,533
Averill Morgan Co.—	21,064
3M Company—	281
Singer, Fazio, Futterman—	35,348
Martin Levin—	2,500
	$173,410

(2) Approximately $75,000 for purchase of machinery and equipment;

(3) Approximately $50,000 for inventory;
(4) Balance solely for operating expenses of Borrower.

(c) Loan conditions, if any, added by SBA: (Use separate sheet, if needed)

See Page 3.

In all cases, before Bank effects a change in the provisions of the loan pursuant to the authority contained in paragraph 2 above, Bank shall first receive a written opinion from its attorney stating that no rights of Bank or SBA are or will be impaired, limited, or adversely affected by such proposed action. Unless expressly authorized herein, inventory or accounts receivable are not to be substituted for other collateral or accepted as additional collateral without prior written consent of SBA.

Except as expressly permitted by this Authorization, the loan shall be administered as provided in paragraph 5 of the Guaranty agreement (SBA Form 597). Any changes made should be reported immediately, to SBA by the holder of the Note.

3. (c) Loan conditions, if any, added by SBA:

1.a. First Mortgage of machinery, equipment, (including automotive equipment), fixtures and furniture now owned and hereafter acquired by Borrower (including, but not limited to (i) machinery, equipment (including automotive equipment), fixtures and furniture referred to in Borrower's Balance Sheet and stated therein to have a total book value of $90,644 as of November 30, 1968, and (ii) the machinery, equipment, fixtures and furniture to be acquired with a portion of the proceeds of the Loan, referred to in paragraph 4 hereof.)

b. Assignment of Life Insurance on the life of Morris I. Kurtz in the amount of $400,000, which is acceptable to the Insurance Company. Said insurance policies to cover the loan and have sufficient cash values assignable as collateral to pay the net amount of Loan due to the end of eight years.

c. Guaranty on SBA Form 148B of Morris I. Kurtz secured by pledge of his approximately ⅓ stock interest in Cornell Uniforms, Inc. and All State Uniforms, Inc. located in Glenside, Pennsylvania.

2. Mr. Kurtz's salary, commissions, bonuses, borrowings from the corporation or drawing acounts or any combination thereof be limited to $15,000 per annum without prior approval by the Guardian Life Insurance Company of New York or their bank designee *and* SBA.

3. Annual Fixed Asset Limitation of $20,000.00.

4. After-acquired Property Agreement.

5. Compensation Agreement, SBA Form 159.

6. Borrower shall provide and maintain hazard insurance in such amounts and for such coverages as shall be satisfactory in all respects to SBA and/or Insurance Company.

7. Borrower to submit quarterly financial statements in form and content satisfactory to Insurance Company and SBA. While the outstanding principal balance of this loan is $100,000 or more, audited financial statements with accountant's opinion shall be submitted annually as soon as possible after close of each fiscal year of Borrower.

8. Borrower will not sell, lease or hypothecate or otherwise dispose of any fixed assets without the prior written consent of the Insurance Company and SBA.

9. Prior to first disbursement on account of the loan, Borrower to execute SBA Form 652C "Applicant's Contingent Assurance of Compliance."

SBA Loan Number L-769,410-00-01-LA
GUARANTY AGREEMENT
(Deferred Participation)

Agreement, made this 11th day of April, 1969, by and between the Small Business Administration, an agency of the United Government (SBA), and THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA (herein referred to as Bank), 201 Park Avenue South, of New York, New York, 10003.

WHEREAS, ARNOLD'S CLEANERS, INC., of 11054 W. Pico Boulevard, Los Angeles, California, (Borrower), a small business concern within the meaning of the Small Business Act, as amended, and Bank have entered into a Loan Agreement (as required in paragraph 2(a)) dated April 11, 1969, and note dated April 11, 1969, evidencing a Loan by Bank to Borrower in the amount of $400,000.00;

WHEREAS, one of the considerations for the making of said Loan by Bank to Borrower is that SBA guarantee Bank against loss in accord with the terms and provisions of this Agreement; and

WHEREAS, a further consideration for the making of said Loan by Bank to Borrower is that Bank may, from time to time, utilize temporary liquidity privilege from SBA not exceeding the amount hereby guaranteed; and

WHEREAS, SBA has determined that such guaranty, under the terms and conditions set forth in this Agreement, is warranted and necessary in order to benefit the borrowing small business concern;

NOW, THEREFORE, in consideration of the mutual promises herein contained, as each to the other made, Bank and SBA represent and agree as follows:

1. Conditions for Disbursement. The Loan shall be disbursed by Bank subject to the terms and conditions set forth in the Authorization of SBA dated February 6,

1969, and all amendments and modifications thereof made and sent to Bank (which Authorization and amendments and modifications are hereinafter collectively referred to as "Authorization").

2. First Disbursement. Prior to the first disbursement to Borrower on account of the Loan, Bank shall receive:

(a) Borrower's Loan Agreement (on SBA Form 153A)*, the Note (on SBA Form 154)* (or, in the case of LLP and SBLP on the combination Note and Loan Agreement on SBA Form 530)*, instruments of hypothecation (containing covenants with respect to the payment of taxes and other charges which constitute prior liens on any real or personal property required as collateral and premiums on the insurance policies required pursuant to paragraph 2(b) hereof), agreements, documents, and evidence required by the Authorization as conditions precedent to such disbursement;

(b) Insurance policies (together with evidence of premium payment) covering the property constituting collateral for the Note against such risks and in such amounts and form and issued by such companies as shall be satisfactory to Bank, containing appropriate loss payable clause in favor of the holder of the Note as its interest may appear;

(c) Written opinion of Bank's counsel that: (i) Note, each of the agreements, hypothecations, and documents required by the Authorization as a condition precedent to such disbursement is a valid and binding obligation in accordance with its terms and (when recordation or filing is appropriate or requisite) has been duly filed or recorded; and (ii) All hypothecations of collateral (except insofar as they purport to cover after-acquired property) required by the Authorization as a condition precedent to such disbursement constitute valid first liens upon the respective properties and rights covered

thereby; Provided, however, That such opinion may reserve appropriate exception with respect to prior liens for taxes not due and payable, prior liens expressly permitted by the Authorization and matters deemed insubstantial by Bank and Bank's counsel.

(d) Satisfactory evidence that, since the date of Borrower's last financial statement submitted in connection with the Loan, there has been no adverse change in Borrower's financial condition, organization, operations, business prospects, fixed or other properties, personnel or any condition of Borrower which is sufficiently serious in the opinion of Bank to warrant withholding disbursement on account of the Loan and which has not been prudently remedied.

3. Subsequent Disbursements. Prior to any subsequent disbursement to Borrower on account of the Loan, Bank shall receive (a) satisfactory evidence that there has been no unremedied adverse change since the date of the latest previous disbursement on account of the Loan as in the manner set forth above in paragraph 2(d); (b) the instrument of hypothecation, agreements, documents, and evidence (if any) required by the Authorization as a condition precedent to such disbursement; and (c) insurance policies (if additional collateral is required for such disbursement) and written opinion of Bank's counsel with respect to such disbursement, in accordance with the provisions of paragraphs 2(b) and 2(c) hereof, to the extent that said provisions are applicable to the disbursement then being made.

4. Sharing of Collateral. Any and all security or guaranty of any nature, including but not limited to rights of set-off and counter-claim, which Bank holds or may receive further to secure Bank with respect to the Loan, or which SBA may acquire in connection with the Loan, shall secure the interests on both Bank and SBA in the Loan.

5. Administration of Loan. (a) Bank shall hold the note, instruments of hypothecation, and all other agreements, documents, and instruments obtained by Bank therewith (hereinafter collectively referred to as "Note and related Loan instruments") and shall receive all payments of principal and interest on the Loan until such time as delivery of such documents to SBA may be required pursuant to paragraphs 11 or 15 of this Agreement or until automatic assignment of the Note might occur as provided in paragraph 7.

(b) Bank shall not (except to the extent permitted by the Authorization) without the prior written consent of SBA (i) make or consent to any alterations in the terms of the Note or related Loan instruments; (ii) make or consent to any release, substitution, or exchange of any of said collateral; (iii) accelerate the maturity of the Note; (iv) sell, assign, or transfer the Note and related Loan instruments; (v) sue upon the Note or related Loan instruments; (vi) waive or agree to waive any claim against Borrower or any guarantor, standby creditor, or other obligor in connection with the Loan; (vii) directly or indirectly change or receive any bonus, fee, commission, or expense in any form in connection with the making of the Loan, except charges or expenses incurred, or for actual services rendered; or (viii) in accordance with authority contained in any security instrument held by Bank evidencing a prior lien on property taken as security for this Loan, increase the amount due on such lien.

(c) In the event the Note and related Loan instruments are assigned by Bank to SBA pursuant to paragraphs 7, 11, or 15 of this Agreement, SBA shall not, without the prior written consent of Bank (i) make or consent to any alterations in the terms of the Note or related Loan instruments; (ii) make or consent to any release, substitution or exchange of any of said collateral; (iii) accelerate the maturity of

the Note; (iv) sell, assign, or transfer the Note and related Loan instruments; (v) sue upon the Note or related Loan instruments, (vi) waive or agree to waive any claim against Borrower or any guarantor, standby creditor, or other obligor in connection with the Loan; or (vii) directly or indirectly charge or receive any bonus, fee, commission, or expense in any form, except charges or expenses incurred, or for actual services rendered.

6. Advice to SBA. Upon making each disbursement on account of the Loan, Bank will immediately advise SBA in writing of the date and amount of disbursement. Bank will advise SBA quarterly in writing on the date provided for payment of the guaranty fee referred to in paragraph 14 hereof, of the date and amount of any payments by Borrower on account of the Loan. Bank will, from time to time, forthwith, deliver to SBA such information, advice, or conformed copies of the Note and related Loan instruments in connection with the Loan as SBA may request.

7. Automatic Transfer of Indebtedness. The commencement of any bankruptcy proceeding, (except a petition filed pursuant to Chapters X, XI, XII, or XIII of the Bankruptcy Act), receivership, dissolution or creditor's rights proceedings by or against Borrower, or an assignment for the benefit of creditors by Borrower, resulting in the indebtedness becoming immediately due and payable under the terms and conditions of the Note, shall effectuate an automatic, simultaneous assignment and transfer of the indebtedness, as evidenced by the Note and related Loan instruments from Bank to SBA, and the obligations of SBA to pay to Bank as hereinafter provided in paragraph 11 shall simultaneously arise. Bank shall immediately notify SBA upon learning of the occurrence of the aforesaid acts.

8. Notice. (a) In the event Borrower defaults in making any payment, when due, of the principal or interest on the Note, Bank shall notify SBA of such default

in writing, within 20 days after the happening thereof unless cured. In the event Bank desires to accelerate the indebtedness pursuant to the terms and conditions of the Note, request for the written consent of SBA required by paragraph 5(b) hereof may be made a part of that notice.

(b) In the event that Bank is authorized to declare all or part of the indebtedness immediately due and payable, as so provided in the terms and conditions of the Note, Bank shall notify SBA thereof in writing within 20 days after it has knowledge of the acts of default on which its authority is founded, unless the Borrower shall have cured such default in the meantime. In the event Bank desires to accelerate the indebtedness pursuant to the terms and conditions of the Note, request for the written consent of SBA required by paragraph 5(b) hereof may be made a part of that notice.

9. Demand. If Borrower shall default in making any payment, when due, of the principal of or interest on the Note, and such default is not cured within 90 days after the happening thereof, the Bank shall have the right to make demand in writing upon SBA for the purchase by SBA of the guaranteed portion of the Loan as provided in paragraph 11.

10. Assignment and Transfer of Loan Instruments. At the time Bank makes demand upon SBA for purchase of Borrower's Note, it shall also assign, transfer and deliver the Note and related Loan instruments without recourse to SBA.

11. Purchase of Guaranty. If a demand is made and the Note, collateral, and other related documents delivered and assigned to SBA as provided in paragraph 10, the Bank shall be entitled to receive payment from SBA within 30 days after receipt of such demand, and SBA hereby agrees to pay to the Bank within such period an amount equal to thirty-seven and one half percent (37½%) of he amount then owing on account of the

Loan (including appropriate adjustment for interest and charges computed to the date of settlement with Bank) subject, however, to the provisions contained in paragraph 17; Provided, however, That if an automatic and simultaneous assignment and transfer of the indebtedness, pursuant to the provisions of paragraph 7 should occur, then Bank shall immediately evidence such assignment and transfer by endorsing, assigning and delivery of the Note and related instruments to SBA, and receive from SBA an amount equal to the agreed percentage of the amount then owing on account of the Loan (including appropriate adjustment for interest and charges) computed as of the date of the automatic transfer. Upon transfer and delivery to SBA of the aforesaid instruments, SBA shall thereupon issue to the Bank a Certificate of Interest evidencing the interest retained by Bank in the Loan.

12. Payment of Expenses. Payments or recoveries under or upon the Loan from Borrower, or other source, as well as all reasonable expenses (including advances for the care, preservation and maintenance of collateral securing the Loan) incurred by SBA or Bank, shall be shared ratably by SBA and Bank in accordance with their respective interest in the Loan as provided in paragraph 11 hereof. SBA will not share in payment of insurance premiums without its prior written consent.

13. Liquidity Privilege. Provided that Bank certifies that (a) it has substantially complied with the terms and conditions of this instrument governing the disbursement and servicing of Borrower's Loan, and (b) the Loan is not delinquent, Bank shall, at any time before making demand on SBA for purchase of Borrower's Note as provided in paragraphs 7, 9, 10 and 11, be entitled to receive from SBA upon request, in exercise of its liquidity privilege hereunder, amounts not to exceed SBA's guaranteed portion of the disbursed and unpaid principal balance of the Loan. Bank may receive advance from SBA, the total maturities of which shall not exceed 90 days in

any 12-month period. No such advance shall be made, the maturity of which is less than 15 days nor which shall extend beyond the maturity date of the Note. Bank shall pay to SBA interest at the rate of five and one half percent (5½%) per annum (per diem basis) on such advances. Request for the exercise of such liquidity privilege shall be made on SBA Form 598.*

14. Guaranty Fees. Bank shall pay to SBA at the end of each calendar quarterly period from the date of the first disbursement on account of the Loan and for so long as SBA's obligation hereunder continues, an amount computed at the rate of one quarter of one percent (¼ of 1%) per annum (per diem basis) of that part of the unpaid principal of the Loan which SBA has guaranteed pursuant to paragraph 11 hereof. The guaranty fee payable hereunder shall not be added to any amount which Borrower is obligated to pay under the Loan.

15. Right of SBA to Purchase. Notwithstanding any other provision of this Agreement, or any other agreement between SBA and Bank, SBA shall have the right at its sole option to purchase the guaranteed percentage, as provided in paragraph 11, if it shall be determined that such purchase is in the best interest of the Government. If SBA exercises its option to purchase as herein set forth, Bank shall forthwith assign, transfer and deliver the Note and related Loan instruments to SBA.

16. Assignment of Interest in Loan. Except as may be required by law, neither party hereto shall assign, in whole or in part, its rights and obligations under this Agreement without the prior written consent of the other party, but nothing contained herein shall prevent the Bank from granting to other financing institutions participating shares in its interest in the Note, provided notice thereof is furnished to SBA; Provided, however, That SBA shall recognize and deal only with the Bank; Provided further, That the prohibition herein contained shall not prohibit use of the Note and this Agreement as

security for a Treasury Tax and Loan Account (authorized in Treasury Department Cicular 92, as revised), so long as Bank has not granted participating shares in the Note to other financing institutions.

17. Termination of Agreement. SBA shall be released from any obligation hereunder, or any obligation to purchase the Note, unless Bank has substantially complied with all of the provisions of this Agreement, or upon the happening of any one or more of the following events:

(a) Failure of Bank to close and disburse the Loan substantially in accord with the terms and requirements of the Authorization; or the servicing of the Loan by Bank in a negligent manner, either of which may result in a substantial loss of the Loan; or

(b) Payment in full of the amount due on the Note; or

(c) Receipt by SBA of written notice from Bank of the termination of this Agreement.

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, Bank has caused this Agreement to be executed on its behalf by its duly authorized officer or officers and its corporate seal to be hereunto affixed, and SBA has caused this Agreement to be executed on its behalf by the Regional Director of its Los Angeles Regional Office, the day and year first above written.

[SEAL]

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

Attest:

By _____

Vice President and Treasurer

BY _____

Alvin P. Meyers, Regional Director

LOAN AGREEMENT
(Loan Guaranty Plan) SBA LOAN NO.

TO INDUCE THE GUARDIAN INSURANCE COMPANY OF AMERICA (Bank) to make and the SMALL BUSINESS ADMINISTRATION (SBA) to guarantee to the extent set forth in the Guaranty Agreement between Bank and SBA, and in consideration of the making by Bank and the guarantying by SBA of a loan or any part thereof (Loan) to ARNOLD'S CLEANERS, INC. (Borrower), approved by an Authorization of SBA dated February 6, 1969, (which Authorization, amendments, and modifications are hereinafter collectively referred to as "Authorization"), Borrower hereby represents and warrants to, and agrees with, Bank and SBA, and each of them that:

1. *Use of Proceeds.*—Borrower will use the proceeds of the Loan solely for the purposes set forth in the Authorization.

2. *Reimbursable Expenses.*—Borrower will, on demand, reimburse bank and SBA respectively for any and all expenses incurred, or which may be hereafter incurred, by Bank or SBA from time to time in connection with or by reason of Borrower's application for, and the making, guarantying and administration of the loan.

3. *Books, Records, and Reports.*—Borrower will at all times keep proper books of account in a manner satisfactory to Bank and SBA. Borrower hereby authorizes Bank or SBA to make or cause to be made, at Borrower's expense and in such manner and at such times as they or either of them may require, (a) inspections and audits of any books, records and papers in the custody or control of Borrower or others, relating to Borrower's financial or business conditions, including the making of copies thereof and extracts therefrom, and (b) inspections and appraisals of any of Borrower's assets. Borrower will furnish to Bank or SBA for the fiscal year end-

ing 4/30/69 and quarterly and thereafter (no later than 2 months following the expiration of any such period) and at such other times and in such form annually as either Bank or SBA may prescribe. Borrower's financial and operating statements, including schedules showing all compensation then being paid by Borrower to all officers, directors, holders of 10% or more of Borrower's capital stock, partners or proprietors. Borrower hereby authorizes all Federal, State and municipal authorities (a) to furnish reports of examinations, records, and other information relating to the conditions and affairs of Borrower and any desired information from reports, returns, files, and records of such authorities upon request therefor by Bank or SBA; and (b) to permit representatives of Bank or SBA to have full access from time to time to, and make copies of and extracts from, any and all reports on returns by, or with respect to borrower, and all reports of examiners or other information concerning Borrower contained in the files and records of such authorities.

4. *Fixed Asset Limitation.*—Borrower will not in any fiscal year make or incur any obligation to make any expenditures for the acquisition of or improvement or addition to any real property, machinery, equipment fixtures or furniture, by purchase or by lease purchase agreement or option, the aggregate cost or annual rental of which is in excess of $20,000, exclusive of such fixed assets to be acquired with the proceeds of the Loan or any part thereof.

5. *Payment of Life Insurance Premiums.* — Borrower agrees, with respect to any life insurance assigned or which may be required to be assigned or pledged as collateral for the Loan, that it will at all times, while said Loan or any part thereof remains unpaid, promptly pay or cause to be paid any and all premiums or charges due or payable upon or on account of any such policy or policies so assigned or pledged, and will at all times, while said Loan or any part thereof remains unpaid, maintain and continue such policy or policies in full force and ef-

fect, and will take any and all action necessary or required by Bank and SBA or by the company or companies issuing any such policy or policies to complete, perfect and preserve the rights of the insured or beneficiary to the end that any such policy or policies will not lapse or be subject to any claim whatsoever. In the event Borrower fails to pay any such premiums when due, Bank or SBA may advance the amount necessary to pay such premiums and add the amount so advanced to the principal indebtedness owing on account of the Loan.

6. *Distributions and Compensation.*—Borrower will not, without the prior written consent of Bank and SBA (a) if Borrower is a corporation, declare or pay any dividend or make any distribution upon its capital stock, or purchase or retire any of its capital stock, or consolidate or merge with any other company, or give any preferential treatment, make any advance, directly or indirectly, by way of loan, gift, bonus, or otherwise, to any company directly or indirectly controlling or affiliated with or controlled by Borrower, or any other company, or to any officer, director, or employee of Borrower, or of any such company, (b) if Borrower is a partnership or individual, make any distribution of assets of the business of Borrower, other than reasonable compensation for services, or give any preferential treatment, make any advance, directly or indirectly, by way of loan, gift, bonus, or otherwise, to any partner or any of its employees, or to any company directly or indirectly controlling or affiliated with or controlled by Borrower, or any other company, or (c) increase the compensation of any person above the respective amount shown for such person in paragraph 7 hereof, or create any new position for any such person; provided that Borrower may fill, through promotion, new employment or otherwise, a vacancy in any of the offices or positions shown in said paragraph 7 at not more than the rate of compensation for such office or position set forth therein. If any company directly or indirectly controlling, affiliated with, or controlled by

Borrower shall increase the compensation paid by it to any person so that the aggregate amount payable to such person from all such sources exceeds the respective amount shown in said paragraph 7, the compensation payable to such person by Borrower will be forthwith correspondingly reduced and immediate notice thereof given to Bank and SBA by Borrower.

7. *Compensation.*—Borrower will limit the total annual compensation (including salaries, withdrawals, fees, bonuses, commissions, drawing accounts and other payments whether direct or indirect, in money, or otherwise) of all officers, stockholders, directors, partners, proprietors or others named herein to the following named persons in the amount set opposite each respective name:

Morris I, Kurtz, President, $15,000

and, if permitted by the Authorization, such additional amount to each said party as may be necessary to pay his income taxes on said compensation computed on the basis that such compensation is his only income, provided that such additional amount shall not exceed the net tax payable by each said party. Borrower, if a corporation, may, upon prior written notice to bank of its intention so to do, accrue on its books or pay additional compensation to any person named herein provided that, if paid, such additional compensation is immediately loaned to Borrower by such person for the use of Borrower until the Loan is paid in full.

8. *Fees and Commissions.*—Borrower has not, directly or indirectly, paid or agreed to pay, or procured any person, partnership, association or corporation, to pay or agree to pay, and will not directly or indirectly pay or agree to pay, or procure any person, partnership, association or corporation to pay or agree to pay, (a) any bonus, fee, commission or other compensation in any form in connection with the application for or the obtaining of the Loan; or (b) any charge or expense, in any form, in connection with said application or Loan, for the ser-

vices of any kind of an appraiser, accountant, attorney, or any other party whatever, whether a person, partnership, association or corporation whether for evidencing matters required to be presented with reference to said application or Loan, or for services in any manner connected with said application or Loan, except as permitted in writing by Bank and SBA, Borrower hereby certifies to Bank and SBA that: The names of all attorneys, accountants, appraisers, agents, and all other parties (whether individuals, partnerships, associations or corporations), engaged by or on behalf of Borrower (whether on a salary, retainer or fee or other basis and regardless of the amount of compensation) for the purpose of rendering professional or other services to Borrower in connection with the application of Borrower for the Loan and Guaranty, or with the making and guarantying of the Loan or for the purpose of expediting said application or the Loan; and all fees or other charges or compensation paid or to be paid therefor, whether in money, property, services or otherwise, by or for the account of Borrower, together with a description of such services rendered, or to be rendered, are set forth in the application for the Loan and no such attorney, accountant, appraiser, agent or other party has been engaged by or on behalf of Borrower for the purposes, or any of them, referred to in this paragraph, since the date of said application except the following: (if none, so state)

Name and Address	Services	To Be Paid	Already Paid
Adams, Duque & Hazeltine	Legal	$1,500	None
James C. Bageman	Legal	$1,000	None

9. *Other Provisions.*

a. *AFTER-ACQUIRED PROPERTY AGREEMENT*

Promptly upon acquiring, subsequent to the date of the Note, any additional property (including, but not limited to, property to be constructed and/or ac-

quired in whole or in part out of the proceeds of the loan) which, if owned by Borrower at the time of the hypothecation required by the Authorization would be subject to the lien of such hypothecation, then all such property when acquired shall forthwith become subject to the lien of such hypothecation and considered as additional colateral to the loan. Borrower will notify the holder of the said note of such acquisition, setting forth a description of the property, the cost, quantity and amount, and will promptly, upon the request of the holder of said Note at its own expense, execute and deliver any documents or instruments deemed necessary and sufficient to constitute a valid lien on such property.

b. Borrower shall provide and maintain hazard insurance in the amounts and for such coverage as shall be satisfactory in all respects to Bank and SBA.

c. Borrower agrees not to sell, lease, hypothecate or otherwise dispose of its fixed assets without the prior written consent of the Bank and SBA.

10. *Parties Affected.*—This Agreement shall be binding upon Borrower and Borrower's successors and assigns and shall inure to the benefit of Bank and SBA, respectively, and their successors and assigns.

IN WITNESS WHEREOF, Borrower has executed or caused to be duly executed this Agreement and has affixed or caused to be duly affixed hereto Borrower's seal, on this 11 day of April, 1969.

ARNOLD'S CLEANERS, INC.
By MORRIS I. KURTZ, President
By RUTH KURTZ, Secretary

NOTE: Corporate applicants must execute Loan Agreement, in corporate name, by duly authorized officer, and seal must be affixed and duly attested; partnership applicants must execute in firm name, together with signature of a general partner.

SUPPLEMENT TO LOAN AGREEMENT AND NOTE

THIS SUPPLEMENT TO LOAN AGREEMENT AND NOTE is made and entered into as of the 11th day of April, 1969, by and between ARNOLD'S CLEANERS, INC., a California corporation ("Borrower"), and THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, a New York corporation ("Guardian"), with reference to the following facts:

A. Pursuant to an Authorization issued by the Small Business Administration (the "SBA") of the United States government under date of February 6, 1969 (the "Authorization"), Guardian proposes to purchase the $400,000 8% promissory note (the "Note") of Borrower.

B. Borrower proposes to deliver to Guardian an executed Loan agreement on SBA form 153a (the "Agreement"), together with the Note.

C. Guardian and Borrower desire that the terms and conditions hereof shall supplement and become a part of the terms and conditions of the Agreement and the Note.

NOW THEREFORE, IN CONSIDERATION OF the foregoing facts and the mutual covenants and conditions contained herein the parties hereto hereby agree as follows:

1. *Loan*. Borrower will borrow from Guardian and, subject to the terms and conditions hereof, Guardian will lend to Borrower the sum of $400,000. Such loan shall be consummated at the offices of Messrs. Adams, Duque & Hazeltine, 523 West Sixth Street, Los Angeles, California 90014, on the date hereof.

2. *Representations of Borrower*. Borrower hereby represents and warrants as follows:

2.1 Borrower is a corporation duly organized, existing and in good standing under the laws of the

State of California, has the corporate power to own its property and to carry on its business as now conducted, is duly licensed or qualified as a foreign corporation to do business, and is in good standing, in every jurisdiction in which such licensing or qualification is necessary, and has no subsidiaries.

2.2 The Balance Sheet of Borrower as at November 30, 1968, and the Statement of Earnings for the 7 months then ended, each of which has heretofore been delivered to Guardian, are true and correct, and have been prepared in conformity with generally accepted accounting principles consistently applied throughout the period involved and consistently with prior periods, and present, respectively, the financial condition of Borrower as at the date thereof and the results of operations for the period covered thereby.

2.3 Since November 30, 1968, there has been no adverse change in the financial condition, organization, operations, prospects, fixed or other properties or personnel of Borrower, or any change in any other condition of Borrower which is or may become materially adverse.

2.4 There is no legal action or proceeding pending or, to the knowledge of Borrower, threatened against Borrower which might result in any material adverse change in the business or financial condition of Borrower.

2.5 Borrower has good and marketable title to its properties and assets including, without limitation, all properties and assets reflected on its Balance Sheet as at November 30, 1968, subject to no lien, charge, security interest or encumbrance of any kind, except as set forth in the Authorization. All such properties and assets are located and used solely within the State of California.

2.6 Borrower has filed all federal and state income tax returns which, to the knowledge of the of-

ficers thereof are required to be filed, and has paid all taxes shown on said returns and all assessments which are due. No federal tax returns of Borrower have been examined and reported on or closed by applicable statutes.

2.7 Borrower is not a party to any contract or agreement or subject to any restriction which materially and adversely affects its business, assets or financial condition. Neither the execution nor delivery of this agreement, the Agreement, the Note or any instrument in connection therewith nor compliance with the terms thereof will be contrary to the provisions of the articles of incorporation or by-laws of Borrower or of any agreement to which Borrower is a party.

2.8 Neither Borrower nor any agent thereof has offered the Note or any similar obligation of Borrower for sale to, or solicited offers to buy the Note or such similar obligation from, any person other than Guardian. Neither Borrower nor any agent acting for it will take any action which would subject the issuance or sale of the Note to the provisions of Section 5 of the Federal Securities Act of 1933, as amended.

3. *Covenants of Borrower*. Borrower covenants and agrees that it will:

3.1 Not incur or permit to exist any debt, or guarantee, endorse or otherwise become contingently liable in connection with the obligations, stock or dividends of any person, except (i) debt represented by the Note, (ii) endorsements in the ordinary course of business of negotiable instruments in the course of collections and (iii) such other debt as is incurred in connection with transactions permitted by paragraph 4 of the Agreement.

3.2 Not sell, lease, hypothecate or otherwise dispose of any of its fixed assets without the prior written consent of Guardian and of the SBA.

3.3 Deliver to the Guardian, in triplicate, for the three-month period ending July 31, 1969, and quarterly thereafter, an income statement, a surplus statement and a balance sheet of Borrower for such quarterly period, signed and authorized by financial officers of Borrower, within 30 days of the end of such quarterly period. Borrower shall also deliver to Guardian, in triplicate, within 90 days after the end of each fiscal year, an income statement, surplus statement and balance sheet of Borrower as at the end of such year, all in reasonable detail, satisfactory in scope to Guardian and the SBA and certified to Borrower by independent certified public accountants selected by Borrower, whose certificate shall be in scope and substance satisfactory to Guardian and who shall have authorized Borrower to deliver such financial statements and certification thereof to Guardian pursuant to this agreement. The foregoing obligations are in addition to the obligations of Borrower under paragraph 3 of the Agreement.

3.4 Keep in force, by the punctual payment of all premiums required, the policy of life insurance assigned to Guardian to secure the payment of the Note, and such policies of hazard insurance, in such amounts and for such coverage and issued by such insurance companies, as shall be satisfactory in all respects to Guardian, and shall cause Guardian to be named loss payee under all such policies of hazard insurance.

3.5 *Monthly Reports*. Until the Note has been paid in full, Borrower shall deliver to Union Bank and to Guardian, on or before the tenth day of each month, a condensed operating report consisting of (i) the amount of sales of Borrower for the preceding month and for the fiscal year through the end of the preceding month, together with such information for comparable periods of the preceding fiscal year, (ii) the amount of accounts receivable and accounts

payable for such dates, (iii) the amount of outstanding bank loans as of the end of the preceding month and as of the end of such month during the preceding fiscal year, (iv) estimated pre-tax earnings for the preceding month and (v) such additional information as Guardian may reasonably request.

4. *Conditions*. The obligations of Guardian hereunder shall be subject to the performance by Borrower of all of the covenants, terms and conditions of the Agreement and the Authorization and to the satisfaction on or before the closing date of the following conditions:

4.1 Guardian shall have received the opinion of Messrs. Adams, Duque & Hazeltine, special counsel for Guardian, dated as of the closing date and satisfactory in form to Guardian, with respect to those matters specified in paragraph 2(c) of the Guaranty Agreement on SBA Form 597 to be entered into by and between Guardian and the SBA (the "Guaranty Agreement"), and with respect to those matters specified in clause a. of this paragraph 4.1. Guardian shall also have received the opinion of James C. Bageman, ESQ., counsel for Borrower, dated as of the closing date and satisfactory in form to Guardian, with respect to (i) those matters specified in paragraph 2(c) of the Guaranty Agreement, (ii) those matters specified in paragraphs 2.1 and 2.4 hereof, and (iii) the following:

a. The Agreement, the Note, this agreement and each security agreement and other document executed by Borrower in connection with the transactions contemplated in the Authorization have been duly authorized, executed and delivered by Borrower and constitute the legal, valid and binding obligations of Borrower;

b. Compliance with the provisions of Division 6 of the California Uniform Commercial Code is not

necessary for the lien of the security interest contemplated by paragraph 3(c)(1) of the Authorization to constitute a valid first lien upon the property affected thereby, effective against all third parties, including the present creditors of Borrower, or, to the effect that all provisions thereof have been duly and validly complied with;

and as to such other matters incident to the transaction contemplated by the Agreement and the Authorization as Guardian may reasonably request.

4.2 The representations and warranties in paragraph 2 hereof shall be true on the date of closing, except for changes herein contemplated. There shall exist on the date of closing no default as specfied in the Note, and Borrower shall have delivered to Guardian appropriate evidence and certificates to such effects.

4.3 Simultaneously with the consummation of the transaction contemplated herein, Borrower shall have applied the proceeds of the loan in accordance with the provisions of paragraph 3(b) of the Authorization and shall have delivered to Guardian satisfactory evidence thereof.

4.4 Borrower shall have complied with the conditions set forth in the Authorization and the Guaranty Agreement as conditions precedent to the disbursement of the principal amount of the loan and shall deliver to Guardian satisfactory evidence of such compliance.

5. *Representation of Guardian.* Guardian represents, and in making this sale to Guardian Borrower understands, that Guardian is acquiring the portion of the Note that is guaranteed by the SBA for its own account for investment and not with a view to, or for sale in connection with, any distribution thereof, and that Guardian will assign its interest in the remaining portion to Union Bank, a California banking corporation.

6. *Definitions*. For the purpose of this agreement the following terms shall have the following meanings:

6.1 "Person" shall mean and include an individual, partnership, corporation, trust, unincorporated association and a government or any department or agency thereof.

6.2 "Subsidiary" shall mean any corporation organized under the laws of any state of the United States, Canada or any of its provinces, conducting the major portion of its business in the United States or Canada, 51% of each class of whose stock is owned by Borrower directly or through subsidiaries.

7. *Effect of Agreement*. The terms and conditions of this agreement shall supplement and become a part of the terms and conditions of the Agreement and the Note. It is not intended that any of the terms or conditions recited herein be inconsistent with the provisions of the Small Business Act or any rules or regulations promulgated thereunder or inconsistent with any other law applicable to this transaction. If any such terms or conditions are inconsistent with the provisions of the Small Business Act or any rules or regulations promulgated thereunder or inconsistent with any other law applicable to this transaction, such terms or conditions shall be null and void. The provisons of this agreement are severable, and the determination that any provision of this agreement is invalid, unenforceable or null and void as aforesaid shall not affect the enforceability of the remaining portions hereof.

8. *Miscellaneous*.

8.1 All representations and warranties made in writing by Borrower in connection herewith shall survive the execution and delivery of this agreement, the Agreement and the Note.

8.2 All covenants and agreements herein shall bind and inure to the benefit of the respective successors and assigns of the parties hereto.

8.3 All communications shall be sent by first class mail, and if to Guardian, addressed as follows:

The Guardian Life Insurance Company of America
201 Park Avenue South
New York, New York 10003
Attention: Securities Investment Department

or to such other place as Guardian shall designate; and if to Borrower, addressed as follows:

Arnold's Cleaners, Inc.
11054 Pico Boulevard
Los Angeles, California 90025

Attention: President

8.4 This agreement is being delivered and is intended to be performed in the Sate of California and shall be construed and enforced in accordance with the laws thereof.

8.5 This agreement may be executed simultaneously in two or more counterparts, which together shall be deemed the orginal. It shall not be necessary in making proof of this agreement to produce or account for more than one counterpart.

8.6 Borrower agrees, whether or not the transaction hereby contemplated shall be consummated, to pay all out-of-pocket expenses arising in connection with this transaction including, but without limiting the generality of the foregoing, reasonable fees and expenses of special counsel for Guardian.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Supplement to

Loan Agreement and Note as of the date first set forth above.

ARNOLD'S CLEANERS, INC.

By _____
President

(SEAL)

By _____
Secretary

THE GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA

By _____
V.P. Treasurer

SBA LOAN NO. L-769, 410-00-01-LA
GUARANTY
(Loan Guaranty Plan)

April 11, 1969

In order to induce THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA (Bank) to make a loan or loans, or renewal or extension thereof, to ARNOLD'S CLEANERS, INC. (Debtor), the undersigned hereby unconditionally guarantees to Bank, its successors and assigns and to the Small Business Administration (SBA) as its interests may appear, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor, made by the Debtor to Bank, dated April 11, 1969, in the principal amount of $400,000.00, with interest at the rate of 8 percent per annum. Such note, and the interest thereon and all other sums payable with respect thereto are hereinafter collectively called "Liabilities." As security for the performance of this guaranty the undersigned hereby mortgages, pledges, assigns, transfers and delivers to Bank certain collateral (if any), listed in the schedule on the reverse side hereof. The term "collateral" as used herein shall mean any funds, guaranties, agreements or other property or rights or interests of any nature whatsoever, or the proceeds thereof, which may have been, are, or hereafter may be, mortgaged, pledged, assigned, transferred or delivered directly or indirectly by or on behalf of the Debtor or the undersigned or any other party to Bank or to the holder of the aforesaid note of the Debtor, or which may have been, are, or hereafter may be held by any party as trustee or otherwise, as security, whether immediate or underlying, for the performance of this guaranty or the payment of the Liabilities or any of them or any security therefor.

The undersigned waives any notice of the incurring by the Debtor at any time of any of the Liabilities, and waives any and all presentment, demand, protest or notice of dishonor, nonpayment, or other default with respect to any of the Liabilities and any obligation of any party at any time comprised in the collateral. The undersigned hereby grants to Bank full power, in its uncontrolled discretion and without notice to the undersigned, but subject to the provisions of any agreement between the Debtor or any other party and Bank at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

(a) To modify or otherwise change any terms of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to Bank) to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, comprise or settlement with respect thereto;

(b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral, and to change the terms of any such agreement;

(c) To forbear from calling for additional collateral to secure any of the Liabilities or to secure any obligation comprised in the collateral;

(d) To consent to the substitution, exchange, or release of all or any part of the collateral, whether or not the collateral, if any, received by Bank upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by Bank;

(e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral,

to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as Bank may elect, at any public or private sale or sales, for cash or on credit or for future delivery, without demand, advertisement or notice of the time or place of sale or any adjournment thereof (the undersigned hereby waiving any such demand, advertisement and notice to the extent permitted by law), or by foreclosure or otherwise, or to forbear from realizing thereon, all as Bank in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.

The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against Bank, by reason of any action Bank may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of Bank, will pay to Bank the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned. Bank shall not be required, prior to any such demand on, or payment by, the undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral. The undersigned shall have no right of subrogation whatsoever with respect to the Liabilities or the collateral unless and until Bank or SBA shall have received full payment of all the Liabilities.

The obligations of the undersigned hereunder, and the rights of Bank in the collateral, shall not be released,

discharged or in any way affected, nor shall the undersigned have any rights against Bank by reason of the fact that any of the collateral may be in default at the time of acceptance thereof by Bank or later; nor by reason of the fact that a valid lien in any of the collateral may not be conveyed to, or created in favor of, Bank; nor by reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way; nor by reason of the fact that any of the Liabilities may be invalid for any reason whatsoever; nor by reason of the fact that the value of any of the collateral, or the financial condition of the Debtor or of any obligor under or guarantor of any of the collateral, may not have been correctly estimated or may have changed or may hereafter change; nor by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any the collateral unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of Bank.

The undersigned agrees to furnish Bank, or the holder of the aforesaid note of the Debtor, upon demand, but not more often than semiannually, so long as any part of the indebtedness under such note remains unpaid, a financial statement setting forth, in reasonable detail, the assets, liabilities, and net worth of the undersigned.

The undersigned acknowledges and understands that SBA has entered into, or will enter into, a Guaranty Agreement with Bank guaranteeing a portion of Debtor's Liabilities. The undersigned agrees that it is not a coguarantor with SBA and shall have no right of contribution against SBA. The undersigned further agrees that all liability hereunder shall continue notwithstanding payment by SBA under its Guaranty Agreement to Bank.

The term "undersigned" as used in this agreement shall mean the signer or signers of this agreement, and such signers, if more than one, shall be jointly and severally liable hereunder. The undersigned further agrees

that all liability hereunder shall continue notwithstanding the incapacity, lack of authority, death, or disability of any one or more of the undersigned, and that any failure by Bank or its assigns to file or enforce a claim against the estate of any of the undersigned shall not operate to release any other of the undersigned from liability hereunder. The failure of any other person to sign this guaranty shall not release or affect the liability of any signer hereof.

_____

MORRIS I. KURTZ

COLLATERAL:

Pledge Agreement executed by MORRIS I. KURTZ pledging his interest in certain securities. Said agreement is attached hereto as Exhibit "A".

December 17, 1970

All right title and interest is assigned to Small Business Administration without recourse this 17th day of December, 1970.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

BY: _____

EDWARD K. KANE, Vice President

ATTEST: _____

WILLIAM J. BURRELL, Secretary

NOTE—Corporate guarantors must execute guaranty in corporate name, by duly authorized officer, and seal must be affixed and duly attested; partnership grantors must execute guaranty in firm name, together with signature of a general partner. Formally executed guaranty is to be delivered at the time of disbursement of loan.

SECURITY AGREEMENT

This Security Agreement is made and entered this 11th day of April, 1969, by and between ARNOLD'S CLEANERS, INC., A California corporation ("Debtor") and THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, a New York corporation ("Secured Party").

Debtor has executed and delivered to Secured Party its $400,000 8 % promissory note (the "Note") of even date herewith pursuant to a loan agreement, as supplemented (the "Agreement"), by and between Debtor and Secured Party. The Note, and any extensions or renewals thereof, is to be secured by a guaranty.

In addition, it is intended that Secured Party shall also be given a valid first lien and security interest in and to all of the machinery, equipment (including automotive equipment), fixtures and furniture now owned or hereafter acquired by Debtor, including but not limited to the machinery, equipment (including automotive equipment), fixtures and furniture described in the Balance Sheet of Debtor as at November 30, 1968, and more particularly described in Exhibit A hereto, and all machinery, equipment, fixtures and furniture acquired by Debtor with any portion of the proceeds of the Note, together with all renewals, replacements and proceeds thereof and additions thereto. All of such property is herein referred to as the "Collateral".

This Security Agreement secures:

A. The payment of the Note and any extensions or renewals thereof;

B. The discharge and performance of all of the obligations and covenants of Debtor contained herein, in the Agreement, the Note or in any other instrument securing the payment of the Note; and

C. Payment by Debtor of all expenses, including attorneys' fees, which Secured Party may incur

in connection with the care or protection of the Collateral.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Debtor does hereby grant to Secured Party a security interest in all of the Collateral, together with all renewals and replacements of, and additions to, any and all of the Collateral, made during the existence of the indebtedness hereby secured, or any portion thereof, and any renewals and extensions thereof.

1. *Debtor hereby represents and warrants that:*

1.1 Debtor has or will have good and marketable title to the Collateral, free and clear of any lien, encumbrance or security interest of any kind, and no financing statement relating to the Collateral, containing general language or including proceeds relating thereto, is or will be recorded or on file in any public office.

1.2 Debtor's chief place of business is 11054 Pico Boulevard, Los Angeles, California 90025.

1.3 The Collateral is personal property, and was purchased, is located and is used solely within the State of California. The Collateral is maintained in accordance with all laws, ordinances, rules and regulations applicable thereto, and, under applicable zoning, use and regulatory laws, ordinances, rules and regulations, the Collateral may be used for the purposes contemplated by Debtor.

2. *Debtor hereby covenants and agrees that:*

2.1 Debtor, at its cost and expense, will protect and defend the Collateral against all claims therein or thereto, or to any part thereof, or any interest therein, and will keep the Collateral free from any other lien, security interest or encumbrance and in good order, repair and condition, and Secured Party, or its agents or attorneys, may examine and inspect

the Collateral at any reasonable times. Debtor will not voluntarily transfer or permit any involuntary transfer of Collateral, or any portion thereof or interest therein, by way of sale, lease, creation of security interest, levy or other judicial process without first obtaining the written consent of Secured Party.

2.2 Debtor will maintain, with respect to all Collateral, insurance against such risks and in such form as may be required by Secured Party, from a responsible company or companies approved by Secured Party and in amounts satisfactory to Secured Party. All policies of insurance shall be payable to Secured Party and Debtor as their interests may appear, and shall provide for no less than thirty days written cancellation notice to Secured Party.

2.3 On demand, Debtor will promptly execute and will promptly pay all costs and expenses of filing such financing statements, continuation statements, partial releases, termination statements and other documents as are deemed necessary or appropriate by Secured Party to establish the validity and priority of the security interest of Secured Party, or any modification thereof, and will promptly pay, on demand, all costs and expenses of any searches required by Secured Party. Debtor will pay all other claims and charges which in the opinion of Secured Party might prejudice, imperil or otherwise affect the Collateral of this security interest therein.

2.4 Debtor will promptly pay, or cause to be paid, when due, all taxes and assessements upon the Collateral, or for its uses or operation, or upon this Security Agreement.

2.5 Debtor shall keep the Collateral at the principal place of business of Debtor, and shall not remove the Collateral therefrom except in the ordinary course of business without the prior written consent of Secured Party.

2.6 Debtor shall promptly deliver to Secured

Party in kind the proceeds of any sale or other disposition of the Collateral regardless of the form of the proceeds. Any payments received by Debtor on account of any sale or other disposition of the Collateral or on account of the proceeds of any sale of other disposition of the Collateral shall be received by Debtor on behalf of Secured Party and shall be kept separate and apart from all other funds and property and identified as the property of Secured Party and shall be delivered immediately in kind to Secured Party.

3. *Debtor and Secured Party hereby mutually covenant and agree that:*

3.1 It shall be lawful for Debtor to retain possession of the Collateral, and at its own expense to keep and use the same in any lawful manner not inconsistent with this Security Agreement.

3.2 If (a) default be made by Debtor in any of the terms or provisions of this Security Agreement, or (b) any warranty, representation or statement, made or furnished to Secured Party by or on behalf of Debtor, shall be false in any material respect when made or furnished, or (c) under any of the provisions of the Note, Secured Party becomes entitled so to elect, then in any of such events all sums due and payable under the terms of the Note shall, at the election of Secured Party, become immediately due and payable. Upon such election by Secured Party, it shall have all the remedies of a secured party available to it under the California Uniform Commercial Code including but not limited to (i) the right to take immediate possession of the Collateral, or any part thereof, and to enter, and remove the Collateral from, any premises upon which the Collateral or any portion thereof may be located, (ii) the right to resell the Collateral at public auction or at private sale, after giving Debtor ten

days notice of the time, place and terms of such sale, (iii) the right to require Debtor to make the Collateral available to Secured Party at a place designated by Secured Party and reasonably convenient to Debtor and (iv) without removal, the right to render the Collateral unusable and to dispose of the Collateral on the premises on which it may be located. All expenses of the repossession, storage, preparation for sale, advertising and sale of the Collateral including, but without limiting the generality of the foregoing, reasonable attorneys' fees and expenses, together with all amounts due and unpaid on the Note, shall be deducted from the proceeds of such sale and the surplus, if any remain, shall be paid to Debtor.

3.3 Debtor shall reimburse Secured Party for all expenses of Secured Party (including reasonable attorneys' fees and legal expenses) relating to the retaking, holding or selling of the Collateral, the collecting of any defaulted payment or the curing of the default in any other obligation of Debtor.

3.4 In the event of default in performance of Debtor's covenants or agreements herein contained, Secured Party may, but need not, perform any act required of Debtor and may, but need not, discharge any taxes, liens, security interests or other encumbrances at any time levied or placed on the Collateral, and make payment for insurance on the Collateral and for maintenance or preservation of the Collateral.

3.5 No default shall be waived by Secured Party except in writing, and no waiver of any default shall operate as a waiver of any other default or of the same default on a future occasion. All rights of Secured Party hereunder shall be cumulative and shall inure to the benefit of Secured Party, its successors and assigns. This agreement may be assigned by Secured Party to any subsequent holder

of the Note or any portion thereof. All covenants and all obligations of Debtor shall bind its legal representatives, successors and assigns.

IN WITNESS WHEREOF, this Security Agreement has been executed by Debtor as of the day and year first above written.

ARNOLD'S CLEANERS, INC.

By _____
President

(SEAL)

By _____
Secretary

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

MORRIS I. KURTZ, being duly sworn according to law deposes and says:

1. On or about April 11, 1969, I was the sole shareholder in the Corporation known as Arnold's Cleaners, Inc. (Arnold's), 11054 Pico Boulevard, Los Angeles, California, 90025.

2. On or about said date Arnold's entered into a loan agreement with Guardian Mutual Life Insurance Company of America (Guardian).

3. Pursuant to the terms of the loan agreement, Guardian lent to Arnold's three hundred and fifty thousand dollars ($350,000.00), secured by a promissory note in the amount of four hundred thousand dollars ($400,000.00), bearing interest at the rate of eight percent (8%) per annum. Furthermore, Imperial Bank (Imperial) which was not guaranteed by the SBA lent to Arnold's fifty thousand dollars ($50,000.00).

4. Pursuant to the terms of the promissory note, regular monthly payments of four thousand, nine-hundred and thirty-five dollars ($4,935.00) per month were to be made to Guardian for a period of eight (8) years with the first payment to be made four (4) months after the date of the note.

5. The Small Business Administraton (SBA) guaranteed only eighty seven and one-half (87½%) percent of $350,000.00 of the original loan. It did not guaranty any part of the $50,000.00 lent by the Imperial Bank.

6. Between September, 1969 and January, 1970, Arnold's was unable to make all payments due Guardian as required by the provisions of the note and loan agreement.

7. I was told by an agent of Guardian that Arnold's account was in arrears in the later part of January, 1970.

8. Arnold's financial condition failed to improve and so was forced to file a petition for arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Central District of California, Case No. 84436.

9. The United States on behalf of the SBA filed a proof of claim as Arnold's major secured creditor, the only other being Transcontinental Leasing, to which Arnold's was indebted for only a nominal amount.

10. On July 16, 1971, over my most strenuous objection, a plan of arrangement was submitted to and accepted by the Court and Arnold's creditors, including the United States.

11. The certificate of stock in Arnold's was never delivered to me but was held in escrow and the Court in Bankruptcy required my escrow to surrender said certificate. Thereafter, new shares of stock were issued to Arnold's new shareholders.

12. From the date of the filing of the Petition for Relief under Chapter XI, operation of Arnold's was taken from me and I never operated it thereafter.

13. The new shareholders and management of Arnold's agreed to the plan of arrangement whereby, the reorganized Arnold's would pay the original debt to the SBA in monthly installments equal to an adopted schedule or one-half of the net profits whichever amount was larger as set forth in the Plan of Arrangement.

14. In addition to the fact that I had no part in the operation of Arnold's after the filing of the Petition for Relief under Chapter XI, after the adoption of the Plan of Arrangement, I never had any ownership interest in Arnold's.

15. The industrial uniform rental routes, which were some of Arnold's most valuable assets, were grossly undervalued, with a value of $100.00 being ascribed to

them under the Plan, whereas they were worth a minimum of $250,000.00.

16. Arnold's, as reorganized under the plan of arrangement, disbanded before the original debt was repaid. The credit given to the reorganized debtor under the plan and upon the liquidation of assets constituted only a small fraction of the value of the assets. The debtor received little or no credit for the disposition of all physical assets and related dry cleaning routes.

17. The action of the SBA with specific reference to its active participation in the arrangement and liquidation of Arnold's deprived me of the right to object to any disposition of the debtor's assets and prevented my disposition of those assets for a substantially greater value.

18. Had the SBA obtained the reasonable value of the assets upon their disposition, the full amount of the original debt would have been realized and repaid.

And further deponent saith not.

MORRIS I. KURTZ

Sworn and Subscribed
Before Me This 26th
Day of April, 1979.

PATRICIA M. MacDONALD
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires December 17, 1979

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT

MORRIS I. KURTZ, being duly sworn according to law deposes and says:

1. In my opinion, based on 48 years in the Textile Maintenance Industy the physcial assets of Arnold's Cleaners as of March of 1969, had a fair value of an amount in excess of $180,000.00.

2. Pursuant to the authorization approving the request for SBA quaranty dated February 6, 1969, of the loan at issue in this case the proceeds were to be allocated as follows:

a) debt payment $173,410.00
b) purchase of new machinery $75,000.00
c) purchase of inventory $50,000.00
d) remainder for working capital.

3. The loan was obtained primarily to enable Arnold's to enter into the industrial uniform rental business. Accordingly since Arnold's had been engaged solely in the Retail Dry Cleaning Business until that time, Arnold's was required to purchase equipment and inventory for the proposed uniform rental business.

4. Upon securing of the proceeds of the loan, Arnold's purchased new physical equipment in 1970 for the amount of approximately $75,000.00 and inventory consisting primarily of industrial uniform garments for the amount of approximately $50,000.00.

5. At the time I was removed pursuant to the Chapter 11 from management, the physical assets of Arnold's were in good condition and were operative.

6. The non-physical or intangible assets of Arnold's Cleaners prior to the loan transaction consisted in part of

retail dry cleaning routes. At all times material hereto, each of the routes generated an average income of $1000.00 per week. After the loan proceeds had been obtained, Arnold's entered into the industrial uniform rental business and had established uniform rental routes separate and distinct from the retail dry cleaning routes generating an average income of $4500.00 per week.

7. The going rate during the years 1969 through and least 1972 for purchase or sale of retail dry cleaning routes was a multiple of 15 times the amount of weekly sales. Hence, I believe that the fair market value of the routes was an amount in excess $100,000.00.

8. The going rate during the years 1969 through 1972 for purchase or sale of industrial uniform rental routes was a multiple of 50 times the amount of weekly sales. Hence an extremely conservative estimate of the fair market value of those routes would amount to approximately $225,000.00. The greater multiple used to determine a fair market value for uniform routes is justified by several factors:

a) Uniform Rental Routes are based upon Customer Service Agreements for a term of years; and

b) Approximately 50% of the 50 times multiple referred to above is for the cost of garments required to service the contracted accounts and the balance is a very conservative estimate for the promotion, creation and development of the contracted accounts; ie, Good Will.

9. Based upon these factors, the assets of Arnold's were worth in excess of the amount which was owed to SBA.

10. I was never notified by SBA of any auction or public sale of the assets of Arnold's nor was I advised of

the manner of disposition or given any opportunity to bid upon the assets.

MORRIS I. KURTZ

Sworn to and subscribed
before me this 12th day
of August, 1981.

GERALDINE LONG

Notary Public, Phila., Phila. Co.
My Commission Expires March 19, 1984

§2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed after April 1, 1980 or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues:

Provided, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to alloted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before April 1, 1980.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced

within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Added Pub.L. 89-505, §1, July 18, 1966, 80 Stat. 304, and amended Pub.L. 92-353, July 18, 1972, 86 Stat. 499; Pub.L. 92-485, Oct. 13, 1972, 86 Stat. 803; Pub.L. 95-64, July 11, 1977, 91 Stat. 268; Pub.L. 95-103, Aug. 15, 1977, 91 Stat. 842.

§337. Four years; written contract; exception; book account; account stated based upon account in writing; balance of mutual; open and current account in writing; rescission of written contract

Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in

writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

3. An action based upon the rescission of a contract in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Where the ground for rescission is misrepresentation under Section 359 of the Insurance Code, the time does not begin to run until the representation becomes false.

(Enacted 1872. Amended by Code Am.1873-74, c. 383, p. 291, § 32; Stats.1906, c. 1, p. 5, § 1; Stats.1907, c. 323, p. 599, § 1; Stats.1917, c. 203, p. 299, § 1; Stats. 1933; c. 790, p. 2116, §1; Stats.1935, c. 614, p. 1740, § 2; Stats.1947, c. 809, p. 1923, § 1; Stats.1961, c. 589, p. 1735, § 6.)

Code Commissioners' Notes

1. Construction of Section.—This section has been held to refer to contracts, obligations, and liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately. Thus, where two persons executed a note, one as principal and the other as surety, and a judgment obtained upon the note is paid by the surety, the obligation of the principal to pay the surety is not "founded upon a written instrument" within the meaning of this section.—Chipman vs. Morrill, 20 Cal., p. 131.

2. What is a Contract in Writing; an Order Entered on the Books of a Corporation—A person acted for two years as President of a corporation, with an understanding that he should be paid, but with no agreement to that effect or as to compensation. Having been reelected for the third year, the Trustees made an order as follows: "Ordered that the compensation of the President be established at fifty dollars per month." And the person continued to serve for two years longer. Held: that such order was a contract to pay past as well as future services at the rate of fifty dollars per month, and that the order was a contract in writing within the meaning of the Statute of Limitations, both for past as well as present pay, and that the statute ran only from the date of the order.—Rosborough vs. Shasta R. Canal Co., 22 Cal., P. 556.

§9105 Definitions and Index of Definitions. (1) In this division unless the context otherwise requires:

(a) "Account debtor" means the person who is obligated on an account, chattel paper, contract right or general intangible;

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or

a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "Collateral" means the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the division dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Document" means document of title as defined in the general definitions of Division 1 (Section 1201);

(f) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (other than goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metalwork and the like unless the structure remains personal property under applicable law), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, contract rights and other things in action. "Goods" also include the unborn young of animals, growing crops, and standing timber which is to be cut and removed under a conveyance or contract for sale;

(g) "Instrument" means a negotiable instrument (defined in Section 3104), or a security (defined in Section 8102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary incorsement or assignment;

(h) "Security agreeement" means an agreement which creates or provides for a security interest;

(i) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(j) "New value" includes new advances or loans made, or new obligations incurred, or the release of a valid and existing security interest, or the release of a claim to proceeds; but "new value" shall not be construed to include extension or renewals of existing obligations of the debtor, nor obligations substituted for such existing obligations.

(2) Other definitions applying to this division and the sections in which they appear are:

"Account." Section 9106.

"Consumer goods." Section 9109(1).

"Contract right." Section 9106.

"Equipment." Section 9109(2).

"Farm products." Section 9109(3).

"General intangibles." Section 9106.

"Inventory." Section 9109(4)

"Lien creditor." Section 9301(3).

"Proceeds." Section 9306(1).

"Purchase money security interest." Section 9107.

(3) The following definitions in other divisions apply to this division:

"Check." Section 3104.

"Contract for sale." Section 2106.

"Holder in due course." Section 3302.

"Note." Section 3104.

"Sale." Section 2106.

(4) In addition Division 1 contains general definitions and principles of construction and interpretation

applicable throughout this division. (Stats.1963, c.819, §9105.).

§9501. Default; Procedure When Security Agreement Covers Both Real and Personal Property. (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this chapter and except as limited by subdivision (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9207. The rights and remedies referred to in this subdivision are cumulative.

(2) After default, the debtor has the rights and remedies provided in this chapter, those provided in the security agreement and those provided in Section 9207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to redemption of collateral (Section 9506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) Subdivision (2) of Section 9502 and subdivision (2) of Section 9504 insofar as they require accounting for surplus proceeds of collateral;

(b) Subdivision (3) of Section 9504 which deals with disposition of collateral;

(c) Section 9505 which deals with acceptance of collateral as discharge of obligation;

(d) Section 9506 which deals with redemption of collateral; and

(e) Subdivision (1) of Section 9507 which deals

with the secured party's liability for failure to comply with this chapter.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this chapter as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this chapter do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this division. (Stats.1963, c. 819, §9501.)

§9504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any

subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor, and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice giving his address, a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made. Such notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor at his address as set forth in the financing settlement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other secured party at the address set forth in his request for notice, at least five days before the date fixed for any public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the

time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any part thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this State. If the collateral is located outside of this State or has been removed from this State, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for the sale. The secured party may buy at any public sale and if the collateral is customarily sold in a recognized market or is the subject of widely or regularly distributed standard price quotations he may buy at private sale. Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interest even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings.

(a) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) In any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division. (Stats.1963, c. 819, §9504.)